(20,924.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 217.

MONTEZUMA CANAL COMPANY, APPELLANT,

vs.

SMITHVILLE CANAL COMPANY ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a In the Supreme Court of the Territory of Arizona.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

Transcript on Appeal.

1 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Graham.

SMITHVILLE CANAL COMPANY, LORENZO CUTLER, BRIGHAM H. Cluff, Marie Morales, Edward C. Phillips, Thomas Kimball, Cynthia Layton, A. E. Crawford, William Price, Lorenzo Watson, David C. Adams, Dorothy E. Smith, Ira Olson, Charles M. Dyer, Nathan P. Worden, John Callen, Janie Bull, W. T. Webb, Henry Lines, Andrew Carlson, J. A. McBride, W. E. McBride, D. C. Judd, J. W. Allred, George Larson, Martin Martinson, J. G. Bigler, B. F. Whitmer, E. M. Allred, Louis Mattice, Louis Norton, F. W. Moody, Squire Reynolds, W. W. Crockett, Myron Hanchett, C. M. Beals and James Mallon, Co-Partners under the Firm Name of Beals and Mallon; W. W. Damron, S. E. Allen, William Bratton, Thomas Preston, C. D. Haynie, Hyrum Weech,
2 Hannah Boyd, John Saline, P. C. Merrill, Robert Ferrin, S. O. Williams, Joseph Pennsyl, Geo. W. Williams, John Taylor, J. H. Nuttall, Sarah Fuller, W. F. Follett, J. F. Shields, J. H. Beal, S. J. Simms, Central Canal Company, H. Louis, John E., Hiram L., William R., and James B. Norton, Co-Partners under the Firm Name of H. Louis Norton and Brothers; Julia A. Daley, George Shirts, Jacob J. Bigler, George A. Bigler, Clarence M. Bigler, Joseph Bigler, H. F. Norton, H. L. Norton, Elizabeth Layton, Samuel Claridge, J. G. Allred, Manuel Palma, Miguel Gonzales, Servera Serrano, Eugene Caruthers, Charles Francis, Miles Ray, Daniel Eldridge, William B. Johnson, Ann Pace, Erastus S. Carpenter, Jacob J. McGuire, M. M. Smith, Mary Ann Carpenter, James M. Moody, Sarah F. Heywood, Joseph N. Heywood, Spence C. Heywood, Ella Heywood, Leland Heywood, David E. Heywood, Sarah V. Heywood, Robert F. Heywood, Irving Y. Heywood, Heirs at Law of J. N. Heywood, Deceased; Edwin Moody, Susan Ann Claridge, Rose Dodge, Hezekiah Stowe, Joseph Cluff, Joseph E. Cluff, William Carpenter, John H. West, Eliza Welker, Frank N. Tyler, Hyrum Brinkerhoff, William K. Cluff, James M. Duke, Christian Madsen, D. W. Cluff, Robert E. Lee, A. S. Porter, W. B. Coombs, Edith Kunz, Manuel Burnel,
3 W. E. Platt, Clarence Woodcock, William Ballard, S. E. Reynolds, Oren Follett, William Follett, J. R. Hamlin, Edward Drew, Elizabeth Craig, W. D. Saline, J. Y. Hendricks, Huldah Mathewson, William Reynolds, W. A. Smith, Isaac Follet, D. W. Cluff, Sr., Jane Cluff, J. A. McBride, Jr., D.

C. McBride, Ann Holliday, W. F. Butler, Mary Magnum, D. M. Rogers, Alfred Rohner, W. E. Jones, L. P. Judd, Lucy Kelly, Samuel Lines, J. H. Lines, Janetta Ferrin, Sarah Taylor, Joseph East, William Hundley, Frederick Webb, J. W. Foster, Lucinda Gustafson, Lyman Dodge, Milton Lines, W. C. Taylor, H. W. Crockett, S. S. Marshall, N. J. Roseberry, John Mattice, Frank Kirby, Cynthia Rogers, J. S. Beals, H. J. Anderson, F. R. Taylor, William Mallon, Andrew Carlson, Jr., Joseph Alder, C. M. Beals, J. D. Boyd, W. B. Ballard, George Ballard, John Cluff, Elizabeth Fuller, Terence O'Bryan, Samuel Williams, *et al.*, Plaintiffs,

vs.

OREGON IRRIGATION AND CANAL COMPANY, LAYTON TOWN CANAL Company, Sunflower Canal Company, Chiricahua Cattle Company, Montezuma Canal Company, San Jose Irrigating Company, San Jose Extension Canal Company, Union Canal and Irrigation Company, The Kempton Canal Company, Graham Canal Company, Sanchez Canal Company, Mejia Canal Company, Furness Canal Company, Bryce Irrigation Canal
4 Company, Curtis Irrigating, Milling and Manufacturing Company, The Nevada Irrigating and Canal Company, Military Canal Company, Fort Thomas Canal Company, Dodge Canal Company, Mrs. J. S. Wilson, R. A. Smith, Jr., J. M. Talley, J. T. Talley, W. H. Mullenax, D. V. A. Talley, George Stewart, Eva Messenger, Joseph B. Blair, John Hancock, Nancy Mattice, Benjamin Echols, J. C. Wanslee, John E. Golding, Moroni Skinner, J. C. Polson, Mrs. C. H. Spafford, I. T. Kempton, Pratt Stewart, William Blair, T. E. Harris, J. A. Allen, Joseph Hunt, John Doe Allred, V. T. Platt, P. O. Peterson, George Skinner, A. Mullenax, William M. Morris, K. V. B. Talley, Mrs. Alex Stewart, T. S. Kimball, Frank Butler, Mrs. Thornton Lambert, Jacob Pulsifer, D. B. Williams, W. R. Waddill, Myrtle O. Goodspeed, George D. Brier, George T. McIntyre, David Angle, E. L. Tidwell, Dimon DeLeon, Dionidio Sanchez, Daniel Sanchez, Abel Sanchez, Santos Serna, Aliseo Sanchez, Policarpio Serna, Adiel Sanchez, Juana Sanchez, Amadeo Tajardo, Ricardo Sanchez, Jesus Vaca, Toliveo Vaca, Juana Van Order, Jesus Montez, Abran Madrid, Bernardo Parra, Amelina Mejia, Samuel Van Order, Ejinio Ortega, Luis Vaca, Harry Van Order, Lonidas Sanchez, John Van Order, Adelina Van Order, Carolina Serna, John Brassea, Martin Marquez, J. P. Ford, Senovio Gonzales,
5 Frank Dysart, Cerbero Bertoldo, Rejinio Chavarria, H. Bingham, Francisco Montez, Jesus Morales, Emilio Viala, Cisto Molino, Clara Furness, Andres Serna, George L. Morris, Victoriano Carrasco, Tomas Perea, Jesus Flores, Sisto Garcia, Pompeyo Jaime, John Reid, Charles Reynolds, J. N. Porter, Robert Pringle, Freeman M. Hubbard, John Saline, Louis Zeckendorf and Albert Steinfeld, Co-Partners under the Firm Name of L. Zeckendorf and Company, Defendants.

Plaintiffs for their amended complaint allege:

I.

That the plaintiffs, Smithville Canal Company and Central Canal Company, are corporations duly created, organized and existing under and by virtue of the laws of the Territory of Arizona and are now and ever since their organization have been doing business in Graham County, Arizona Territory.

II.

That the defendants, Oregon Irrigation and Canal Company, Layton Town Canal Company, Sunflower Canal Company, Montezuma Canal Company, San Jose Irrigating Company, San Jose Extension Canal Company, Union Canal and Irrigation Company, The Kempton Canal Company, Bryce Irrigation Canal Company, Curtis
6 Irrigating, Milling and Manufacturing Company, The Nevada Irrigating and Canal Company, Military Canal Company, Fort Thomas Canal Company, The Dodge Canal Company, are each of them corporations organized and existing under and by virtue of the laws of the Territory of Arizona and are doing business at Graham County, Arizona Territory. That the defendants, Mrs. J. S. Wilson, R. A. Smith, Jr., J. M. Talley, J. T. Talley, W. H. Mullenax, D. V. A. Talley, George Stewart, Eva Messenger, Joseph B. Blair, John Hancock, Nancy Mattice, Benjamin Echols, J. C. Wanslee, John E. Golding, Moroni Skinner, J. C. Polson, Mrs. C. H. Spafford, I. T. Kempton, Pratt Stewart, William Blair, T. E. Harris, J. A. Allen, Joseph Hunt, John Doe Allred, V. T. Platt, P. O. Peterson, George Skinner, A. Mullenax, Wm. M. Morris, K. V. B. Talley, Mrs. Alex Stewart, T. S. Kimball, Mrs. Thornton Lambert, Frank Butler and Jacob Pulsifer claim to be the owners of a certain canal company known as "The Graham" Canal through and by which they wrongfully divert, take and carry water from the Gila River at a point on the North bank of said river near the S. W. cor. of N. E. ¼ of N. W. ¼ Sec. 9 T. 6 S. R. 26 E. G. & S. R. B. & M. in Graham County, Arizona Territory, as is hereinafter alleged. That the defendants, D. B. Williams, W. R. Waddill, and Myrtle O. Goodspeed claim to be the owners of a certain canal company known as "The Chacon" Canal through and by which they wrongfully divert,
7 take and carry water from the Gila River at a point about 75 rods N. of S. line of N. W. ¼ Sec. 17 T. 7 S. R. 27 E. G. and S. R. B. & M. and about 40 rods E. of the west line of said N. W. ¼ of said Sec. 17, as is hereinafter alleged. That the defendants, George D. Brier, George T. McIntire, and David Angle, claim to be the owners of a certain canal commonly known as the "Le Ditch" through and by which they wrongfully divert, take and carry water from the Gila River at a point on the North bank of said river near center of N. W. ¼ of N. W. ¼ Sec. 13 T. 6 S. R. 26 E. G. and S. R. B. and M. in Graham County, Arizona Territory, as is hereinafter alleged. That the defendant, E. L. Tidwell claims to be the owner of a certain canal commonly known as the "Brown Ditch" through and by which he wrongfully diverts, takes and carries water from the Gila River at a point 30 chs. N. of S. E. cor. of Sec. 30, T. 6 S.

R. 28 E. G. & S. R. B. & M. as is hereinafter alleged. That the defendants, Dimon DeLeon, Dionida Sanchez, Daniel Sanchez, Abel Sanchez, Santos Serna, Aliseo Sanchez, Policarpio Serna Adiel, Sanchez, Juana Sanchez, Amadeo Tajardo, Ricardo Sanchez, Jesus Vaca, Tolivio Vaca, Juana Van Order, Jesus Montez, Abram Madrid, Bernardo Parra, Abelina Mejia, Samuel Van Order, Ejinio Ortega, Luis Vaca, Harry Van Order, Leonidas Sanchez, John Van Order, Adelina Van Order, Carolina Serna and John Brassea claim to be the owners of that certain canal commonly known as the "Sanchez Canal" through and by which they wrongfully divert, take and carry water from the
8 Gila River at a point on said river near the N. W. cor. Sec. 32, T. 6 S. R. 28 E. G. and S. R. B. & M. in Graham County, Arizona Territory, as is hereinafter alleged. That the defendants, Martin Marquez, Aliseo Sanchez, Jesus Vaca, J. P. Ford, Juana Van Order, Tolivio Vaca, and Senovio Gonzales claim to be the owners of that certain canal commonly known as the "Gonzales Canal" through and by which they wrongfully divert, take and carry water from the Gila River at a point on the west bank of said river near the S. W. cor. of N. E. ¼ of S. E. ¼ Sec. 31, T. 6 S. R. 28 E. G. & S. R. B. and M. in Graham County, Arizona Territory,

as is hereinafter alleged. That the defendants, Frank Dysart, Cerbero Bertoldo, Jesus Montez, Rejinio Chavarria, and H. Bingham claim to be the owners of that certain canal commonly known as the "Mejia Canal" through and by which they wrongfully divert, take and carry water from the Gila River at a point on the north bank of said river near S. E. cor. of S. W. ¼ Sec. 31, T. 7 S. R. 28 E. G. and S. R. B. and M. in Graham County, Arizona Territory,

as is hereinafter alleged. That the defendants, Francisco Montez, Jesus Morales, Emilia Viala, Sisto Molino, Clara Furness, Andress Serna, George L. Morris, Victoriano Carrasco, Tomas Perea, and Jesus Flores claim to be the owners of that certain canal known as the "Old San Jose Canal" through and by which they wrong-
9 fully divert, take and carry water from the Gila River at a point on the south bank of said river near N. W. cor. of N. E. ¼ of N. E. ¼ Sec. 1 E. 6 S. R. 27 E. G. and S. R. B. and M in Graham County, Arizona Territory,

as is hereinafter alleged. That the defendants, Frank Dysart, and Sisto Garcia claim to be the owners of that certain canal commonly known as the "Michelena Canal" through and by which they wrongfully divert, take and carry water from the Gila River at a point on the west bank of said river near N. E. cor. of S. W. ¼ of N. E. ¼ Sec. 3, T. 6 S. R. 27 E. G. and S. R. B. and M. in Graham County, Arizona Territory,

as is hereinafter alleged. That the defendant, Pompeyo Jaime claims to be the owner of that certain canal commonly known as the "Jones Ditch" through and by which he wrongfully diverts, takes and carries water from the Gila River at a point on the north bank of said river near N. W. ¼ of N. E. ¼ Sec. 13, T. 6, S. R. 26 E. G. and S. R. B.

and M. in Graham County, Arizona Territory, as is hereinafter alleged.

III.

That the defendant, The Kempton Canal Company, a corporation, as aforesaid, is the owner of a certain canal known as the "Kempton Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' canals and appropriated and used by said plaintiffs as is hereinafter alleged. That the said
10 claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to any of the water flowing in the Gila River, or to convey the same through the said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights as is hereinafter set forth.

IV.

That the defendant, Bryce Irrigation Canal Company, a corporation, as aforesaid, is the owner of a certain canal known as the "Bryce Canal" and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by plaintiffs as is hereinafter alleged. That the said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to any of the waters flowing in said Gila River and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights as is hereinafter set forth.

V.

That the defendant, Curtis Irrigating, Milling and Manufacturing Company, a corporation, as aforesaid, is the owner of a certain canal known as the "Curtis Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs, as is hereinafter al-
11 leged. That the said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to any of the water flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

VI.

That the defendant, The Nevada Irrigating and Canal Company, a corporation as aforesaid, is the owner of a certain canal known as the "Nevada Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs, as is hereinafter alleged. That the said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to any of the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to the plaintiff's prior rights, as is hereinafter set forth.

VIII.

That the defendant, Military Canal Company, a corporation as aforesaid, is the owner of a certain canal known as the "Military Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs as is hereinafter alleged. That the said claim of said defendant is invalid and without right, and if said de-
12 fendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

VIII.

That the defendant, Fort Thomas Canal Company, a corporation, as aforesaid, is the owner of a certain canal known as the "Fort Thomas Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs as is hereinafter alleged. That the said claim of said defendant is invalid and without any right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

IX.

That the defendant, The Dodge Canal Company, a corporation as aforesaid, is the owner of a certain canal known as the "Dodge Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs as is hereinafter alleged. That the said claim of said defendant is invalid and without any right, and if
13 said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

X.

That the defendants, John Reid and Charles Reynolds, claim to be the owners of a certain canal known as the "Reid Ditch." That said defendants claim and assert a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs as hereinafter alleged. That said claim of said defendants is invalid and without right, and if said defendants have any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XI.

That the defendants, J. N. Porter, Robert Pringle and Freeman M. Hubbard, claim to be the owners of a certain canal known as the

"Collins Canal." That said defendants claim and assert a right and interest in and to the waters flowing through plaintiffs' said canals, and appropriated and used by said plaintiffs, as is hereinafter alleged. That said claim of said defendants is invalid and without right, and if said defendants have any right whatever in
14 or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XII.

That the defendant, Freeman M. Hubbard, claims to be the owner of a certain canal known as the "Old Moore" or "Thompson" canal. That said defendant claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by plaintiffs, as is hereinafter alleged. That said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XIII.

That the defendant, John Saline, claims to be the owner of a certain canal known as the "Saline Ditch." That the said defendant claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by plaintiffs, as is hereinafter alleged. That the said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to
15 convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XIV.

That the defendant, J. N. Porter, claims to be the owner of a certain canal known as the "Porter Ditch." That said defendant claims and asserts a right in and to the waters flowing through plaintiffs' said canals and appropriated and used by plaintiffs, as is hereafter alleged. That said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights as is hereinafter set forth.

XV.

That the defendants, Louis Zeckendorf and Albert Steinfeld, copartners under the firm name of L. Zeckendorf and Company, claim to be the owners of that certain canal known as the "Zeckendorf" or "Vokel" canal. That said defendants claim and assert a right and interest in and to the said waters flowing through plaintiffs'

VIII.

That the defendant, Military Canal Company, a corporation as aforesaid, is the owner of a certain canal known as the "Military Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs as is hereinafter alleged. That the said claim of said defendant is invalid and without right, and if said de-
12 fendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

VIII.

That the defendant, Fort Thomas Canal Company, a corporation, as aforesaid, is the owner of a certain canal known as the "Fort Thomas Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs as is hereinafter alleged. That the said claim of said defendant is invalid and without any right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

IX.

That the defendant, The Dodge Canal Company, a corporation as aforesaid, is the owner of a certain canal known as the "Dodge Canal," and claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs as is hereinafter alleged. That the said claim of said defendant is invalid and without any right, and if
13 said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

X.

That the defendants, John Reid and Charles Reynolds, claim to be the owners of a certain canal known as the "Reid Ditch." That said defendants claim and assert a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by said plaintiffs as hereinafter alleged. That said claim of said defendants is invalid and without right, and if said defendants have any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XI.

That the defendants, J. N. Porter, Robert Pringle and Freeman M. Hubbard, claim to be the owners of a certain canal known as the

"Collins Canal." That said defendants claim and assert a right and interest in and to the waters flowing through plaintiffs' said canals, and appropriated and used by said plaintiffs, as is hereinafter alleged. That said claim of said defendants is invalid and without right, and if said defendants have any right whatever in
14 or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XII.

That the defendant, Freeman M. Hubbard, claims to be the owner of a certain canal known as the "Old Moore" or "Thompson" canal. That said defendant claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by plaintiffs, as is hereinafter alleged. That said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XIII.

That the defendant, John Saline, claims to be the owner of a certain canal known as the "Saline Ditch." That the said defendant claims and asserts a right and interest in and to the waters flowing through plaintiffs' said canals and appropriated and used by plaintiffs, as is hereinafter alleged. That the said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to
15 convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XIV.

That the defendant, J. N. Porter, claims to be the owner of a certain canal known as the "Porter Ditch." That said defendant claims and asserts a right in and to the waters flowing through plaintiffs' said canals and appropriated and used by plaintiffs, as is hereafter alleged. That said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights as is hereinafter set forth.

XV.

That the defendants, Louis Zeckendorf and Albert Steinfeld, copartners under the firm name of L. Zeckendorf and Company, claim to be the owners of that certain canal known as the "Zeckendorf" or "Vokel" canal. That said defendants claim and assert a right and interest in and to the said waters flowing through plaintiffs'

said canals and appropriated and used by plaintiffs, as is hereinafter alleged. That said claim of said defendant is invalid and without right, and if said defendant has any right whatever in or to the waters flowing in the Gila River, and to convey the same
16 through said canal, or to the use thereof, it is subsequent, subservient and subject to plaintiffs' prior rights, as is hereinafter set forth.

XVI.

That the Gila River is a natural water course and public stream flowing in a westerly direction through that portion of said County of Graham, Arizona Territory, known as "The Upper Gila Valley" and through or adjacent to the farming lands hereinafter described, owned and cultivated by the respective plaintiffs herein. That the natural rainfall is totally inadequate to supply the necessities of persons residing upon, owning and cultivating the said lands for the purpose of growing various grains, hay, grasses, fruits, vegetables and kindred products, for watering live stock and for household and domestic purposes. Nor is there any means whatever, whereby the necessities of such persons and such lands can be supplied and satisfied, in that behalf, save and except by the application thereon of the waters of the Gila River, for the irrigation of said lands by means of canals and ditches, and the said Gila River is the only stream of water from which such supply can, or could, during all the times hereinafter mentioned, be obtained. That without the application of said waters upon said lands in the manner aforesaid, all of said lands are unproductive and valueless to occupants or owners thereof.

XVII.

That in the early part of the year 1873 divers persons, the
17 plaintiffs hereinafter named, or their grantors and predecessors in interest in the lands and appropriation of water hereinafter described, then being the occupants, possessors and owners of the lands hereinafter described, desiring to reduce said lands to a state of cultivation and to grow thereon various grains, hay, fruits, grasses, vegetables and other farming products by irrigating the said lands and crops with the water of the said Gila River, and to procure water for live stock and for household and domestic purposes, took up, located and appropriated fifteen hundred inches of water flowing in said Gila River by immediately, at a large expenditure of time, money and labor, building a dam in the bed of said Gila River at a point about 32 chains East and 7 chains South of the Northwest corner of Section 8, T. 7 S. R. 26 E. of G. & S. R. B. & M. and also building and constructing a canal of sufficient capacity to carry all of said fifteen hundred inches of water, at said point on the south bank of said river and running in a westerly direction through or adjacent to the lands hereinafter described, and upon the completion of said dam and canal took and conveyed said fifteen hundred inches of water to and upon the said lands hereinafter described, which said water was thereupon immediately used and applied upon

said lands by the said occupants, possessors and owners thereof, for the purposes aforesaid.

18 XVIII.

That said canal was at all times since its construction, and is now, capable of conveying and did convey the whole of said fifteen hundred inches of water from said Gila River to said lands, and the said occupants, possessors and owners of said lands or their successors in interest, the plaintiffs hereinafter named, ever since the early part of said year 1873, when said fifteen hundred inches of water was first diverted by them from said Gila River and applied on the said lands and the various crops growing thereon, as aforesaid, actually and in good faith claimed and used said water for irrigating said lands, and now actually and in good faith claim the said water and use the same upon said lands for such purpose, except when prevented by the wrongful acts of the defendants, as is hereinafter alleged.

XIX.

That at the time of the construction of said canal, which was then and has ever since been known as the "Central Canal," and the diversion, appropriation and application of said fifteen hundred inches of water, there was flowing in said Gila River, free and unobstructed at the said point of diversion, more than three thousand inches of water, of unappropriated and unused water, which has at all times, since then, flowed in said river, at said point of diversion, except when prevented by the wrongful acts of defendants, as is hereinafter alleged.

19 XX.

That the said fifteen hundred inches of water, diverted, appropriated, claimed and used, as aforesaid, by the occupants, possessors and owners of the lands hereinafter described, and irrigated by the waters conveyed in said Central Canal, and their successors in interest, was not and is not excessive or unreasonable and at all times ever since the early part of the year 1873 has been, and is now, needed and required to irrigate said lands and the whole thereof.

XXI.

That on or about the 31st day of December, 1890, the occupants, possessors and owners of said lands hereinafter described, irrigated by the waters diverted and appropriated as aforesaid and conveyed in said Central Canal, and of said Central Canal, who were either the original appropriators and users of said water and occupants, possessors and owners of said lands or who succeeded to their rights and privileges in said appropriation of water and in said lands, for the purpose of securing a more methodical, economical and satisfactory distribution, use and application of said fifteen hundred inches of water conveyed in said canal, amongst themselves and their successors in interest, and for the better management, use and control of said canal and its waters, duly formed and organized the corporation plaintiff, Central Canal Company, and became shareholders therein,

and duly transferred to it all their rights and interests in
20 and to said canal and dam and the right to carry and convey said appropriation of fifteen hundred inches of water through said canal for distribution to those entitled thereto, towit, the original appropriators and users of said water and occupants, possessors and owners of said lands, hereinafter described, or their successors in interest in said water and lands, shareholders in said corporation. That said corporation ever since the date of its organization and now, has the management and control of said Central Canal and dam, and of the distribution of the waters conveyed therein, to the original occupants, possessors and owners of said lands and appropriators and users of said water on said lands or to their successors in interest.

XXII.

That the following named plaintiffs are shareholders in said Central Canal Company, and are either the original occupants, possessors and owners of the lands following the names of each of them, and original appropriators and users of said waters conveyed in said Central Canal, or their successors in interest in said lands and waters, to-wit:

Here follow the names of the individual plaintiffs with the description of the lands owned by them respectively.

Omitted at request of Appellant.

21 XXIII.

That the above named plaintiffs, shareholders in said Central Canal Company, or their respective predecessors in interest in the above described respective parcels of land and said appropriation of water, have continuously cultivated and farmed the aforesaid parcels of land and used and applied all of said fifteen hundred inches of water thereon for the purpose of irrigating the same ever since the early part of the year 1873, except when prevented from so doing by the wrongful acts of defendants, as is hereinafter alleged.

XXIV.

That on or about the — day of March, 1876, divers persons, the plaintiffs hereinafter named, or their grantors and predecessors in interest in the lands and appropriation of water hereinafter
22 described, then being the occupants, possessors and owners of the lands hereinafter described, desiring to reduce said lands to a state of cultivation and to grow thereon various grains, hay, fruits, grasses, vegetables and other farming products by irrigating the same by the waters of said Gila River, and to procure water for live stock and for household and domestic purposes, took up, located and appropriated fifteen hundred inches of water flowing in said Gila River by immediately at a large expenditure of time, money, and labor, building a dam in the bed of said Gila River at a point about 41 chains N. and 12½ chains W. of the S. E. cor. of Sec. 35, Townsite 6 South, Range 25 East, G. and S. R. B. and M., in said County of Graham, and also by building and constructing a ditch or canal of sufficient capacity to carry all of said fifteen

hundred inches of water, at said above named point, on the south bank of said river and running in a westerly direction through or adjacent to the parcels of land hereinafter described, and upon the completion of said dam and canal took and conveyed said fifteen hundred inches of water to and upon the hereinafter described parcels of land, which said water was thereupon immediately used and applied upon said lands by the said occupants, possessors and owners thereof for the purposes aforesaid.

XXV.

That in order to secure a better management, use and con-
23 trol of said canal and the waters flowing therein, the said occupants, possessors and owners of said parcels of land, hereinafter described, duly formed and organized a corporation, known as the Smithville Irrigation, Milling and Manufacturing Company, and became shareholders therein, and duly transferred to it all their rights and interest in and to said canal and dam, and the right to carry and convey said appropriation of fifteen hundred inches of water through said canal for distribution to those entitled thereto, to-wit: the original appropriators and users of said water, and occupants, possessors and owners of said lands. That said corporation ever since the date of its organization, in March 1876, and up to and until the 24th day of February 1891, has had the management and control of said canal and dam and of the distribution of the waters conveyed therein to the original occupants, possessors and owners of said hereinafter described lands, and appropriators and users of said water upon said lands, or to their successors in interest.

XXVI.

That said canal was at all times since its construction, and is now, capable of carrying and did carry the whole of said fifteen hundred inches of water from said Gila River to *to* said lands. That the said occupants, possessors and owners thereof and their successors in in-
terest ever since the month of March, 1876, when said fifteen
24 hundred inches of water was first diverted by them from said Gila River and applied upon said lands, and the various crops growing thereon, as aforesaid, actually, and in good faith, claimed and used said water for irrigating said lands and crops and now actually and in good faith claim the said water, and use the same upon said lands, except when prevented by the wrongful acts of defendants, as is hereinafter alleged.

XXVII.

That at the time of the construction of said canal and the diversion, appropriation and application of said fifteen hundred inches of water upon the lands hereinafter described, there was flowing in the Gila River, free and unobstructed, at said point of diversion more than three thousand inches of water, of unappropriated and unused water, which has at all times since then flowed in said river at said point of diversion, except when prevented by the wrongful acts of the defendants, as is hereinafter alleged.

XXVIII.

That the said fifteen hundred inches of water diverted, appropriated, claimed and used, as aforesaid, by the occupants, possessors and owners of the lands hereinafter described irrigated by the waters conveyed in said canal and their successors in interest in said lands and water, was not and is not excessive or unreasonable, and at
25 all times, since the month of March, 1876, has been and is now needed and required to irrigate said lands and the whole thereof.

XXIX.

That on or about the 24th day of February 1891 the occupants, possessors and owners of said lands, irrigated by the waters diverted and appropriated, as aforesaid, and conveyed in said canal, shareholders in said Smithville Irrigation Milling and Manufacturing Company, and who were either the original appropriators and users of said water, and occupants, possessors and owners of said lands, or who succeeded to their rights and privileges in said appropriation of water and in said lands, for the purpose of securing a more methodical, economical and satisfactory distribution, use and application of said fifteen hundred inches of water, conveyed in said canal, amongst themselves, and their successors in interest, and for the better management, use and control of said canal and its waters, duly formed and organized the corporation plaintiff, Smithville Canal Company, and became shareholders therein, and together with the said Smithville Irrigation Milling and Manufacturing Company, duly transferred to it all their right, title and interest in and to said canal and dam, and the right to carry and convey said appropriation of fifteen hundred inches of water through said canal for dis-
26 tribution to those entitled thereto, towit, the original appropriators and users of said water and said occupants, possessors and owners of said lands or their successors in interest, shareholders in said corporation. That said plaintiff, Smithville Canal Company, ever since the date of its organization, and now, has the management and control of said canal and dam and of the waters conveyed therein to the original occupants, possessors and owners of said lands, and appropriators and users of said water, or to their successors in interest.

XXX.

That the following named plaintiffs are shareholders in said Smithville Canal Company and are either the original occupants, possessors and owners of the lands following the names of each of them and original appropriators and users of said waters, conveyed in said canal, or their successors in interest in and to said lands and waters, to-wit:

Here follow the names of the individual plaintiffs with the description of the lands owned by them respectively.

Omitted at request of Appellant.

XXXI.

That said above named plaintiffs, shareholders in said Smithville Canal Company, or their predecessors in interest, have continuously

cultivated and farmed the aforesaid parcels of land and used and applied all of said fifteen hundred inches of water thereon, for the purpose of irrigating the same, ever since the month of March, 1876, except when prevented from so doing by the wrongful acts of defendants as hereinafter alleged.

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XXXII.

That at the time of the construction of said two canals and the diversion, appropriation and application of said waters, therein conveyed, by the individual plaintiffs, or their respective predecessors in interest, for the uses and purposes aforesaid, and for a long period of time prior thereto, all of the water diverted and appropriated, as aforesaid, flowed free in said Gila River, unused and unappropriated and subject to diversion, appropriation and use by said individual plaintiffs or their predecessors in interest, described in this amended complaint, as shareholders in either the Central Canal Company or Smithville Canal Company.

XXXIII.

That the lands above described owned by the individual plaintiffs herein, aggregate about six thousand five hundred acres, and said lands are each and all of them arable and irrigable, and with irrigation are of great value and will produce large and valuable crops of wheat, barley, corn, alfalfa, vegetables, fruits and other farm products, but without irrigation they are wholly worthless and will produce no kind of crops whatever. That all of said lands have been put into a high state of cultivation by the respective owners thereof, and have been improved at great cost and expense. That a large portion of said lands have been seeded in alfalfa, and or-

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chards and vineyards have been planted thereon, and the remainder thereof is annually seeded in winter crops of wheat and barley and in summer crops of corn and vegetables and throughout all portions of the year the said water diverted and appropriated, as aforesaid, is needed for application and use upon said lands, in order to cause the same to produce the various aforesaid crops, grasses, hay, fruits and vegetables.

XXXIV.

That especially during the summer months, and dry seasons of each year, all of said three thousand inches of water diverted, appropriated and applied, as aforesaid, is required to properly irrigate the above described parcels of land, and the crops, trees, vines and plants growing thereon, and to mature the same, and said individual plaintiffs designated herein, either as shareholders in the Central Canal Company or Smithville Canal Company, are now and have been ever since the respective dates of their diversion and appropriation of said water as above set forth, entitled to have said water appropriated by them, as aforesaid, flow free and unobstructed from said Gila River into said canals, for the uses and purposes aforesaid, as against each and all of the defendants herein; and said individual plaintiffs, and each of them, have had ever since the dates of their

respective diversions and appropriations of said three thou-
29 sand inches of water, as is hereinbefore set forth, and now, have the prior and better right to the use of said water so diverted, appropriated and applied by them as aforesaid, without hindrance or obstruction, and to have the same flow in said canals, for the uses and purposes aforesaid, than each, any and all of the defendants herein, and all persons whomsoever claiming or to claim the same.

XXXV.

That long subsequent to the time of the construction of said Central Canal and said canal now belonging to the Smithville Canal Company, and the diversion, appropriation and application of said water, as above set forth, conveyed and distributed by means of said canals, to and upon the respective parcels of land, above described, and long subsequent to the time these individual plaintiffs as the respective original occupants, possessors and owners of said parcels of land and original diverters, appropriators and users of said three thousand inches of water, or their successors in interest in and to said lands and waters, made such diversion, appropriation and application, said defendants, Oregon Irrigation and Canal Company, Layton Town Canal Company, Sunflower Canal Company, Montezuma Canal Company, San Jose Irrigating Company, San Jose Extension Canal Company, Union Canal and Irrigation Company, E. L. Tidwell and those individual parties defendant, described in this
30 amended complaint, as the alleged owners of the "Sanchez Canal," "The Gonzales Canal," "The Old San Jose Canal," "The Mejia Canal," "The Michelena Canal," "The Chacon Canal," "The Jones Ditch," "The Lee Ditch" and "The Graham Canal," and each of them, entered in and upon said Gila River at points thereon above the dams of the Central Canal and the Canal belonging to the Smithville Canal Company and have built and constructed dams in, over and across the bed of said river and have thereby wrongfully and unlawfully obstructed and prevented the free flow of the waters in said river down to the heads of said two canals, and have constructed ditches of sufficient capacity to divert and carry out of and away from said river all of the waters thereof, to which these individual plaintiffs are entitled and which they had heretofore diverted, appropriated and applied as is hereinabove set forth, and said defendants have by means of said dams and ditches, wrongfully and unlawfully, as is hereinafter alleged, diverted said water from said Gila River and prevented the same from flowing into said two canals at the times when the same was greatly needed and required for the purposes of irrigating the above described parcels of land and the various crops and products growing thereon.

XXXVI.

That during the years 1900, 1901, 1902 and 1903 and more particularly during the months of May, June, July, August and
31 September of each of said years, said defendants and each of them wrongfully and unlawfully upon divers and sundry

occasions, and for periods of many days' duration, at a time, diverted said water acquired and appropriated by the individual plaintiffs, as is hereinabove set forth, and carried and conveyed the same away by means of their said ditches, constructed by each of them as aforesaid, and thereby wrongfully and unlawfully prevented said waters from flowing into said two canals and to and upon the respective parcels of land belonging to the individual plaintiffs hereinabove described, and wrongfully and unlawfully deprived said individual plaintiffs of the use of said waters for the purpose of irrigating the crops, vines, fruit trees and vegetables and other farm products, growing on said lands, and threaten to continue to so wrongfully and unlawfully divert and carry away said waters, to the great and irreparable loss, injury and damage of said individual plaintiffs.

XXXVII.

That during said months of May, June, July, August and September of the years 1900, 1901, 1902 and 1903, said individual plaintiffs had growing upon the respective parcels of land, above described, valuable crops of wheat, barley, alfalfa, corn, fruit trees, vines, vegetables and kindred products, which by the use of the water which by right ought to have flowed in said two canals, would have matured and yielded abundantly. But by reason of the
32 wrongful and unlawful acts of said defendants in depriving said individual plaintiffs of the use of said waters, as is hereinabove set forth, said crops of grain, hay, fruit, vegetables and other products withered, blasted and decayed and became greatly injured and impaired in quality, diminished in quantity and decreased in value, to the great loss, injury and damage of said individual plaintiffs.

XXXVIII.

That said defendants and each of them wrongfully and unlawfully threaten to continue to divert said water from said Gila River and to prevent the same from flowing into said two canals and threaten to and will wrongfully and unlawfully appropriate the said water to their own use and deprive said individual plaintiffs thereof. That unless said defendants and each of them are restrained by order of this Honorable Court, they, and each of them, will continue to wrongfully and unlawfully and in violation of the rights of said individual plaintiffs divert said water from said river and appropriate the same to their own use and benefit and prevent any part thereof from flowing into said two canals to be through each of them distributed to and upon the respective lands of said individual plaintiffs, hereinabove described under said respective canals, and will wrongfully and unlawfully wholly deprive them of the use of said water diverted, appropriated and applied heretofore by them, as
33 hereinabove set forth. and will thereby render their said lands worthless for any purpose whatever, to their great and irreparable loss, injury and damage.

XXXIX.

That the injury complained of against said defendants results directly from their joint and several wrongful acts, claims and assertions of rights against these plaintiffs. That these plaintiffs cannot have a full, complete, adequate and final determination of their respective rights in the subject matter of this action without joining as parties plaintiff against said defendants, against whom plaintiffs have a common grievance, as is hereinabove set forth. That plaintiffs have no plain, speedy and adequate remedy at law.

XL.

Wherefore plaintiffs pray that it be adjudged and decreed that said individual plaintiffs, shareholders in the Central Canal Company, either as original occupants, possessors and owners of the lands above described as belonging to each of them and as original diverters, appropriators and users of the fifteen hundred inches of water above described, or as successors in interest in and to said land and water, have been ever since the early part of the year 1873, and are now entitled to have said quantity of water flow into the canal of the plaintiff Central Canal Company, at all times, and ever since
34 said time and are now entitled to use and enjoy the same without let, hindrance or obstruction upon the part of said defendants, or either of them. That said individual plaintiffs, shareholders, in the Smithville Canal Company, either as original occupants, possessors and owners of the lands above described as belonging to each of them, and as original diverters, appropriators and users of the fifteen hundred inches of water above described, or as successors in interest and to said lands and water, have been ever since the — day of March 1876, and are now entitled to have said quantity of water flow into the canal of the plaintiff Smithville Canal Company, at all times, and ever since said date, and are now entitled to use and enjoy the same without let, hindrance or obstruction upon the part of said defendants, or either of them.

That it be further adjudged and decreed that the plaintiffs, Central Canal Company and Smithville Canal Company, have at all times since their creation and are now entitled to have the respective appropriations of fifteen hundred inches of water, diverted by each of them from said Gila river, and to carry and convey the same through said respective canals and distribute the same to the several individual plaintiffs hereinabove named to and upon the respective parcels of land under said two canals, hereinbefore described without diminution by or interference, hindrance or obstruction upon the part of said defendants, or either of them.

35 That it be further adjudged and decreed that said defendants, and each of them herein charged with diverting water from said river at points thereon above the respective dams of plaintiffs shall at all times hereafter permit said water to flow in said river free and unobstructed, so that the plaintiffs can divert and receive the same in their said canals and carry and convey the same to the respective persons and lands entitled thereto.

That all of the defendants named in this amended complaint be required to set forth whatever rights and claims, if any they have, in and to the waters flowing in said Gila River, and if it be determined that they, or either of them, have any rights whatever in or to the said waters flowing in said river that it be decreed that such rights of each of them are subsequent, subservient and subject to the prior rights of said plaintiffs in said waters.

That it be further ordered and decreed that each of said defendants, their agents, servants, employees, privies, and assigns be enjoined and restrained permanently from diverting from, or in any manner preventing the free flow of said water in said Gila River and from in any manner interfering with plaintiffs in the full use thereof, for the purposes hereinabove alleged.

That upon final hearing this Court decree and give to plaintiffs a perpetual injunction against said defendants, and each of them, preventing them from in any manner whatsoever interfering
36 with the rights of plaintiffs in and to the use of said water appropriated as aforesaid, and that plaintiffs have such and further relief as may be meet, equitable and just, the premises considered, and that plaintiffs be awarded their costs herein expended.

JOS. H. CAMPBELL,
EDWARDS & McFARLAND,
Attorneys for Plaintiffs.

Filed July 18th, 1904.
FRANK DYSART, *Clerk.*

Answer of San Jose Irrigating Company.

[Title of Cause.]

I.

Come now the defendants, the San Jose Irrigating Company and the San Jose Extension Canal Company and demurring, separately and severally, to the amended complaint herein, say that the amended complaint does not state facts sufficient to constitute a cause of action against them, or either of them separately.

II.

For further answer the said defendants, the San Jose Irrigating Company and the San Jose Extension Canal Company, deny each and every allegation in the amended complaint contained.

37 III.

The defendants, the San Jose Irrigating Company and the San Jose Extension Canal Company and B. B. Adams, Jesus Ayers, Alma H. Bennett, W. A. Bennett, Annie Austin, W. T. Barney, A. F. Barnett, H. W. Bishop, Alice A. Bishop, F. W. Bishop, Innocent Bertoldi, Jose Bertoldi, A. Curtis, Samuel Curtis, C. and E. Carroco, Fernando Cervantez, Jesus Carrasco, Jesus and Petra Carrasco, W. F. Clark, B. R. Clark, John Cline, Henry Dial, Fred Dysart, Frank

Dysart, Lina M. Dudley, J. C. Epley, George Evans, John Evans, E. J. Edwards, John H. Evans, Wm. Ellsworth, George Foote, Angel Franco, Joaquin Figerroa, Amalia Freudenthal, Mrs. Julia M. Fitzgerald, C. Garcia, Graham County, Gillespie and Freudenthal, Vincente Greco, Tomas Garcia, Jesus Garcia, Luther Green and estate of N. Green, Luther Green, C. W. Hoopes, T. T. Hunter, Mrs. J. F. Judia, Wiley E. Jones, William Johns, A. A. Johnson, Mary Lacy, Daniel Layman, H. M. Merrill, Morris Martinella, Joe Martin, Montezuma Flour Milling Company, H. S. Mashbir, H. M. Merrill, M. E. Church South, Alice Merrill, A. Mejia, Avalina Mejia, J. I. Massey, Mrs. O. C. May, Elizabeth M. May, Oliver C. May, A. G. McAlister, C. E. Moorman, W. L. Nelson, T. O'Bryan, J. T. Owens, William H. Parks, W. H. Parks, Mrs. Lillian E. Parks, D. B. Ryan and Minnie M. Ryan, Jennie V. Rawlins, Frank Richardson,
38 Lena Richardson, C. L. Rawlins, R. B. Smith, Solomonville Townsite, I. E. Solomon, John See; John S. See, M. F. Swanger, Mrs. George Stevens, Charles F. Solomon, Mitt Simms, School District No. 5 Graham County, M. A. Southlee, Louis Sais, E. M. Simpson, Mrs. Anna Solomon, Felipe Topia, H. C. Usher, S. L. Usher, W. A. Wilson, W. R. Waldrop, who now pray that they may be made parties defendant hereto, and now with leave of court, appear in this cause as defendants, jointly with the said defendants, the said San Jose Irrigating Company and the said San Jose Extension Canal Company, jointly and severally, for answer to the amended complaint herein and by way of cross-complaint and counter-claim against plaintiffs' herein, and against all their co-defendants in this cause, not joining herein, say:

That the said defendant, B. B. Adams is now and was at the time of the filing of the amended complaint herein, and for a long time prior thereto, had been the owner and occupant and engaged in the cultivation of the following described real estate, situate in Graham County, Arizona, and described as follows, that is to say: Lots 2, 3, 4, 5, and 6, in block 45 of Mexican Addition to Solomonville and four acres, being lots 14, 15, 16 and 17 in block 2 in Parks' Addition to Solomonville.

Here follow separate statements as to the holdings of each of said defendants joining in this answer, in the same language as last paragraph, except only as to the varying description of the holdings. Omitted at request of Appellant.

That all of the lands herein described are naturally desert and will not produce any useful crop or product except by means of artificial irrigation. That the only source of water for such
39 irrigation is the Gila river, a public stream of water flowing near said lands and easily accessible for water for said irrigation of said lands.

That heretofore, to-wit, in the year 1873 and before the plaintiffs, or any of them or their grantors or predecessors in interest, and before any of the defendants to this suit, other than those joined in this answer, or their grantors or predecessors in interest diverted or attempted to divert, or appropriated and used or attempted to appropriate and use any of the waters of the said Gila river for irrigation

or any other useful or beneficial use, the defendants in this answer named (except the defendants the San Jose Irrigating Company, the San Jose Extension Canal Company, and the Montezuma Flour Milling Company) or their grantors or predecessors in interest, then being inhabitants of the Territory of Arizona, and being severally the owners and occupants of the several tracts or parcels of land hereinbefore described, entered upon said Gila river and therein constructed dams and other works for the obstruction of the flow of the water thereof, and constructed headgates, and canals and ditches and flumes whereby the water of said Gila river could be conveyed to and upon the said lands of the defendants herein named (except said San Jose Irrigating Company, the said San Jose Extension Canal Company and the said Montezuma Flour Milling Company) and did then and by means of said headgates, canals, ditches, flumes and other
40 works, divert said water from said Gila river, or so much thereof as was necessary for the proper cultivation of said lands, and convey the same to and upon said lands, and use the same for the irrigation and cultivation of said lands, and have ever since that date, to this time, continuously, except as interrupted by certain of the defendants hereinafter named, in the manner hereinafter described, diverted water from said river to said lands and used the same upon said lands for the irrigation and cultivation thereof.

That in the year 1892 the defendants herein named (except the said San Jose Irrigating Company, the said San Jose Extension Canal Company and the said Montezuma Flour Milling Company) being the appropriators and users of water from said Gila river for the irrigation and cultivation of the lands hereinbefore described, or their grantors and predecessors in interest to said lands and to the right to the use of the water for the irrigation thereof, for the more easy, convenient, efficient and economical management, maintenance and operation of the dams, headgates, canals, ditches, flumes and other works theretofore used by the said defendants, their grantors and predecessors in interest, as aforesaid, caused to be organized, under the laws of this territory, a corporation under the name and style of the San Jose Irrigating Company, which said San Jose Irrigating Company is one of the defendants in this cause. That upon the organization of said corporation, the San Jose Irrigating
41 Company, the said Company was, by the other defendants herein and hereby answering (except the said San Jose Extension Canal Company and the said Montezuma Flour Milling Company) charged with, and it thereupon assumed, undertook and has ever since taken, had and exercised the possession and control of all said dams, headgates, canals, ditches, flumes and other works, and has ever since operated, repaired and maintained the same for the purpose of diverting said water from said Gila river for the use and benefit of the defendants in the irrigation of their said lands, as it had theretofore been done by them, and as it has ever since been done and still is being done by the said San Jose Irrigating Company, for them and for their use and benefit.

The defendants further say that in the year 1904 divers of the de-

fendants herein named, being the appropriators and users of water from said Gila river as hereinbefore alleged, for the easier, more convenient, efficient and economical management, maintenance and operation of a part of the canal theretofore managed, controlled, maintained and operated by the defendants, caused to be organized, under the laws of this Territory, a corporation under the name and style of the San Jose Extension Canal Company. That upon the organization of said corporation (the said San Jose Extension Canal Company) it became charged with and took upon itself the management, repair and operation of a part of the canal theretofore
42 managed and operated by the said defendant, the San Jose Irrigating Company, and by means thereof has delivered to said defendants the water theretofore used and appropriated by them as aforesaid, as they had theretofore by themselves, or their predecessors in interest, and, since its organization, by the said San Jose Extension Canal Company diverted and delivered it and used it upon their lands, for the irrigation and cultivation thereof. That the said San Jose Extension Canal Company is the same San Jose Canal Company mentioned in the complaint and made a defendant thereto.

The defendants further say that at divers times, before the bringing of this suit, the defendants, H. Bingham, John Brossea, Cerbero Bertoldi, Rijinio Chavarria, Dimon De Leon, Victoriana Corrasca, Clara Fourness, J. P. Ford, Jesus Flores, Senovio Gonzales, George L. Morris, Jesus Montez, Abran Madrid, Abalino Mejia, Francisco Montez, Jesus Morales, Sisto Molino, Bernardo Parra, Tomas Paria, Andres Serna, Carolina Serna, Leonidas Sanchez, Ricardo Sanchez, Dionido Sanchez, Daniel Sanchez, Abel Sanchez, Santos Serna, Aliseo Sanchez, Paticopia Serna, Adiel Sanchez, Juan Sanchez, E. L. Tidwell, Amadeo Tajardo, Jesus Vaca, Folivio Vaca, Juana Van Order, Harry Van Order, Adelina Van Order and Viola Emilio, unlawfully, wrongfully and without right, and in violation of the rights of these defendants, entered upon said Gila river, at points
43 above the point where these defendants have for more than thirty years, as aforesaid, been accustomed to divert water from said river, for the irrigation of their said lands, and there, by means of dams and other obstructions of the flow of the water of said river, and by means of canals and ditches and other works, diverted and conveyed said water from said river so as to greatly diminish the volume of the water thereof flowing in said river to the dams and other works of these defendants, whereby these defendants were, at such times, prevented from diverting water from said river for the proper irrigation of their said lands as aforesaid and the growth of their crops, attempted to be grown upon their said lands, was prevented and greatly retarded, to the great damage of these defendants.

That said last named defendants are maintaining their said dams, canals, ditches and other works in and upon said river and threaten, unless restrained by this court, to continue to divert water from said river, and thereby prevent the defendants joining in this answer from diverting the water, to which they are entitled to divert as hereinbefore set out, for the irrigation and cultivation of their said lands to their great and continued damage.

That the defendants in this action, other than those joining in this answer, and in addition to those specifically named herein, claim to have some right to divert water from said river and to use
44 the same, these defendants deny that such defendants have any right to divert water therefrom at all.

Wherefore these defendants pray that the plaintiffs, and each of them, severally, take nothing against these defendants by their suit. That these defendants be adjudged to have, severally, the right to divert from said Gila river, from time to time as may be needed therefor, water sufficient to properly irrigate their lands, respectively, as hereinbefore described, and that such right to take and use such water is prior and superior to that of any other of the parties to this suit, if any they or any of them have.

That each and all of the parties to this suit be perpetually enjoined from obstructing the flow of water in said river or diverting it therefrom, or interfering therewith, or doing any other act or thing to prevent the full enjoyment, by these several defendants, of their respective said rights to the use of said water from said river for the cultivation of their said lands respectively.

That they may be adjudged to have the costs by them incurred and expended in this suit and finally such other relief as it may be determined they are entitled to.

JOSEPH H. KIBBEY,
Attorney for Said Defendants.

[Endorsed:] Filed September 19th, 1904. Frank Dysart, Clerk.

45 *Answer of Frank Dysart and Sixto Garcia to Amended Complaint.*

[Title of Cause.]

Come now the defendants, Frank Dysart and Sixto Garcia and for answer to the complaint herein, say:

I.

That the complaint does not state facts sufficient to constitute a cause of action against them or either of them.

II.

They deny each and every allegation in said complaint contained.

III.

Further answering and by way of counter-claim against the plaintiffs herein, and asking for affirmative relief against said plaintiffs and certain of the defendants herein, the said Frank Dysart and Sixto Garcia, say:

That said Frank Dysart is the owner of that certain real estate situate in Graham County, Arizona, described as follows: Lots 3, 4, 6 and 8 in section 18 and lot 4 and the southeast quarter of the south-

west quarter of section 7, T. 7 S., R. 27 E., containing 179.80 acres, and lots 1, 2, 9 and 11 in section 18, and the south
46 half of the southeast quarter of section 7, and the south half of the southwest quarter of section 8, and the southeast quarter of section 8, and the southeast quarter of the northeast quarter of section 8, all in township 7 south, R. 27 east, containing 450.58 acres.

That the said defendant, Sixto Garcia, is the owner of that certain real estate situate in said Graham County, Arizona, and described as follows: Lots 1, 3, 5 and 6 in section 17, T. 7 S., R. 27 E.

That in the year 1873 and before the plaintiffs, or their predecessors in interest, and the other defendants herein entered upon the Gila river as alleged in their complaint and began the diversion of water therefrom for the irrigation of the lands described in the complaint, or any of them, these defendants and their grantors and predecessors in interest, being the owners or occupants severally of the lands hereinbefore described, entered upon said Gila river, on the north bank thereof near the center of section 3, township 7 south, range 27 east, Gila and Salt River base and meridian lines, and there constructed a dam and other obstructions in said river whereby to obstruct and divert the flow of the water thereof, and thence constructed a canal or ditch, running in a generally westerly direction to and upon the lands owned and occupied by them or their grantors and predecessors in interest, as above described by means whereof water could be diverted from said river and thereby and
47 therein carried to and upon the lands aforesaid of these defendants, their grantors and predecessors in interest. That by means of said dams, and of proper flumes, gates and other appliances, said defendants and their said grantors and predecessors in interest did, in said year 1873, divert and convey said water, in quantities sufficient to irrigate their said lands, and by means thereof cultivated said lands to profitable crops, grass, grain and fruits and have ever since that time, continually and uninterruptedly, as they had the right to do, diverted water from said river by said means and conveyed the same to and upon their said lands and therewith cultivated said lands, except as they have unlawfully, from time to time, been interrupted in said use by the wrongful acts of certain of the defendants hereinafter named.

That these defendants now have the right to take, and to continue to take, severally, water from said river, sufficient at all times, to properly irrigate their said lands, respectively.

That all of the lands herein described are naturally desert and will not produce any useful crop or product except by means of artificial irrigation.

That the only source of water for such irrigation is the Gila river, a public stream of water flowing near said lands and easily accessible for water for said irrigation of said lands.

The defendants further say that at divers times, before the
48 bringing of this suit, the defendants, H. Bingham, John Brossea, Cerbero Bertoldi, Rijinio Chavarria, Dimon De Leon,

Victoriana Corrasca, Clara Fourness, J. P. Ford, Jesus Flores, Senovio Gonzales, George L. Morris, Jesus Montez, Abran Madrid, Abalino Mejia, Francisco Montez, Jesus Morales, Sisto Molino, Bernardo Parra, Tomas Paria, Andres Serna, Carolina Serna, Leonidas Sanchez Ricardo Sanchez, Dionido Sanchez, Daniel Sanchez, Abel Sanchez, Santos Serna, Aliseo Sanchez, Paticopia Serna, Adiel Sanchez, Juan Sanchez, E. L. Tidwell, Amadeo Tajardo, Jesus Vaca, Folivio Vaca, Juana Van Order, Harry Van Order, John Van Order, Adelina Van Order and Viola Emilio, unlawfully, wrongfully and without right, and in violation of the rights of these defendants, entered upon said Gila river, at points above the point where these defendants have for more than thirty years, as aforesaid, been accustomed to divert water from said river, for the irrigation of their said lands, and there, by means of dams and other obstructions to the flow of the water of said river, and by means of canals and ditches and other works diverted and conveyed said water from said river so as to greatly diminish the volume of the water thereof flowing in said river to the dams and other works of these defendants, whereby these defendants were, at such times, prevented from diverting water from said river for the proper irrigation of their said lands as aforesaid and the growth of their crops, attempted to be
49 grown upon their said lands, were prevented and greatly retarded, to the great damage of these defendants.

That said last named defendants are maintaining their said dams, canals, ditches and other works in and upon said river and threaten, unless restrained by this court, to continue to divert water from said river, and thereby prevent the defendants joining in this answer from diverting the water, to which they are entitled to divert as hereinbefore set out, for the irrigation and cultivation of their lands to their great and continued damage.

That the defendants in this action, other than those joining in this answer, and in addition to those specifically named, claim to have some right to divert water from said river and to use the same; these defendants deny that such defendants have any right to divert water therefrom at all.

Wherefore these defendants pray that the plaintiffs, and each of them, severally, take nothing against these defendants by their suit. That these defendants be adjudged to have, severally, the right to divert from said Gila river, from time to time as it may be needed therefor, water sufficient to properly irrigate their lands, respectively, as hereinbefore described, and that such right to take and use such water is prior and superior to that of any other of the parties to this suit, if any, they or any of them have.

That each and all of the parties to this suit be perpetually
50 enjoined from obstructing the flow of water in said river or diverting therefrom, or interfering therewith, or doing any other act or thing to prevent the full enjoyment, by these defendants, of their said rights to the use of said water from said river for the cultivation of their said lands, respectively.

That they may be adjudged to have the costs by them incurred

and expended in this suit and finally such other relief as it may be determined they are entitled to.

JOSEPH H. KIBBEY,
Attorney for said Defendants.

[Endorsed:] Filed September 19th, 1904. Frank Dysart, Clerk.

Answer of Montezuma Canal Company et al., to Amended Complaint.

[Title of Cause.]

Comes now the defendant, Montezuma Canal Company, by its attorneys, Herring & Sorrin, and makes answer to the amended complaint of plaintiffs as follows.

I.

Paragraphs XVII, XVIII, XIX, XX, XXI, XXII, XXIII,
51 XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX,
XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI,
XXXVIII and XXXIX, of said amended complaint are denied.

II.

Defendant alleges that it now is, and at all time hereinafter referred to was, the owner of the Montezuma Canal; that said canal was constructed by defendant prior to the year 1873, and was operated, and ever since has been, and is now, operated by it for the purpose of conveying water from the Gila River to and upon the arable and irrigable lands occupied, held, possessed and owned by those persons, inhabitants of Arizona, who became appropriators and users of two thousand miner's inches of water of said river for the irrigation and cultivation of said lands, (which said lands have remained in the occupation and possession of said appropriators, and their grantees and successors in interest hereinafter named), prior to the appropriation and use of the water of said river for the irrigation and cultivation of lands by any of the plaintiffs, or those who claim the right to divert the water of the Gila river by means of the several canals mentioned in said complaint, and prior to the appropriation and use of the water of said river for the irrigation and cultivation of land claimed by any of the codefendants of defendant, referred to in said complaint;

That since the appropriation of said quantity of water
52 conveyed by said canal by the appropriators thereof, the said appropriators and their successors in interest, who are also shareholders in said defendant company, have continuously required and now continuously require the use of said water for the irrigation and cultivation of the lands severally occupied by them, as hereinafter named;

That said Montezuma Canal is situate in the County of Graham, and commences at a point in the bed of the Gila River in Section 17, Township 7 South, Range 27 East, Gila and Salt River Meridian; thence through Sections 17 and 18 of said township; thence through

Sections 24, 23, 22, 21, 20, 17 and 18 of Township 7 South, Range 26 East, Gila and Salt river Meridian, thence through Sections 13, 14, 11 and 10 of Township 7 South, Range 25 East, Gila and Salt River Meridian, and ends in the Northeast Quarter of said Section 10;

That from a point in the Northeast Quarter of Section 21, Township 7 South, Range 26 East, Gila and Salt River Meridian, near what is commonly known as the Sand Wash, and commencing near the head gate of Joseph Weech on Section 22, Township 7 South of Range 26 East, the said canal is known under the name of the Layton Town Canal; that for the convenience and economical use of the water of said canal from said last named point, the users of the water in said canal, who are also shareholders in said Montezuma Canal Company, have, for some time past, been permitted to
53 manage the same under the organization known as the Layton Town Canal Company, which was duly incorporated under the laws of the Territory of Arizona about March 16, 1891;

III.

That the lands cultivated by the appropriators and users of water of the Gila river conveyed by said canal, and the several owners and occupants of said lands are as follows, to-wit:

In the S. W. ¼ of Sec. 18, Twp. 7 S., R. 27 E., G. & S. R. M., Vicente Suarez, 32 acres; Manuel and Francisca Grijalva, 15 acres; J. W. N. Scarlett, 24 acres; Abraham Diaz, 15 acres; Merahildo Grijalva, 25 acres; Bernardo Telles, 10 acres; Cristino Grijalva, 14 acres;

Here follows a description of the lands of each of these answering defendants in the same language as last above excepting *only* descriptions of their several lands.

Omitted at request of Appellant.

IV.

That said lands are all valuable and by irrigation produce
54 large crops of grain, alfalfa, fruit and vegetables, but without irrigation are practically worthless, that the annual rainfall upon said lands is entirely insufficient to permit the cultivation of the same; that the water appropriated and applied to the cultivation of said lands as aforesaid is necessarily required continuously throughout the year.

V.

That as against the rights of the co-defendants of defendant the San Jose Irrigating Company and those claiming the use of water diverted thereby from the Gila River by means of the San Jose Canal; the San Jose Extension Canal Company, and those claiming the use of the water conveyed by the San Jose Extension Canal; E. L. Tidwell, Dimon DeLeon, Dionidio Sanchez, Daniel Sanchez, Abel Sanchez, Santos Serna, Alisco Sanchez, Policarpio Serna, Adiel Sanchez, Juana Sanchez, Amadeo Tajardo, Ricardo Sanchez, Jesus Vaca, Toliveo Vaca, Juana Van Order, Jesus Montez, Abram Madrid, Ber-

nardo Para, Abelina Mejia, Samuel Van Order, Ejinio Ortega Luis Vaca, Harry Van Order, Leonidas Sanchez, John Van Order, Adelina Van Order, Carolina Serna, John Brassea, Martin Marquez, J. P. Ford, Senovio Gonzales, Frank Dysart, Cebero Bertoldo, Rejinio Chavarria, H. Bingham, Francisco Montez, Jesus Morales, Emilio Viala, Sisto Molino, Clara Furness, Andres Serna, George
55 L. Morris, Victoriano Carrasco, Thomas Perea, Jesus Flores, Sisto Garcia, and Pompeyo Jaime, defendant alleges the fact to be that the question of priority of appropriation between defendant and the appropriators and users of water under defendant's canal and the said above named co-defendants and their predecessors in interest was fully and finally determined in an action in the district court of the Second Judicial District of the Territory of Arizona, in and for the County of Graham, in which action the Montezuma Canal Company, a corporation, was plaintiff and the said San Jose Irrigating Company, a corporation, *et al*, were defendants, and in which action a judgment and decree was duly made by said court in behalf of the plaintiff and against the defendants; that plaintiff has the right and is entitled to have flow in said Montezuma Canal continuously from said Gila River at all times during the dry seasons of the year and when the water is low and scarce in said river, one thousand miner's inches of water, and has had and is entitled to have flow from said river into said canal two thousand miner's inches of water during the times of wet seasons of the year when the water is high and plentiful therein, as against each and all of the defendants in said action, which said decree was so made on the 17th day of February, 1897.

VI.

For a further and separate defense to plaintiffs' complaint,
56 defendant alleges, that plaintiffs' cause of action, if any, did not accrue within ten years next before the bringing of this action;

That defendant is a corporation organized and existing under and by virtue of the laws of the Territory of Arizona; that said corporation was formed by the appropriators of water of the Gila River, hereinafter named, their grantors and predecessors in interest, who are inhabitants of said Territory and who appropriated and used said water in the irrigation and cultivation of the lands owned and occupied by them and hereinafter described; that the purpose and object of the creation of defendant was to provide an adequate and economical method of diverting, conveying and distributing two thousand miner's inches of the water of the Gila River to and upon the lands of said individual users and appropriators thereof, by whom said water was necessarily used in the irrigation and cultivation of their said lands, and to provide for the better management and control of said water, and to facilitate its distribution among the said persons entitled thereto; that ever since its creation defendant has had the management and control of said two thousand inches of water; that defendant is the owner of the Montezuma Canal referred to in the complaint herein, and that the said individual appropriators

and users of said two thousand inches of water of the Gila River hereinafter referred to are also the shareholders of defendant;

57 that for more than ten years next before the institution of plaintiffs' suit, the owners and occupants of lands herein described, irrigated by the waters of the Gila River diverted and conveyed by said Montezuma Canal and the branches and laterals thereof, have been in the peaceable and adverse possession and user of two thousand miner's inches of the water of said Gila River, so conveyed and diverted by said canal, its branches and laterals, for the irrigation and cultivation of said lands, and have been using and enjoying the same for the cultivation of said lands as heretofore set forth in paragraph III of the first defense in this answer, which paragraph is hereby expressly referred to and incorporated herewith; that said user, diversion and appropriation of said water by said owners and occupants have been exercised under a claim of right, and have been actual, continuous, uninterrupted, peaceable, open, notorious, exclusive, hostile and adverse to plaintiffs and each of them, and those claiming the right to use water claimed to be conveyed by plaintiffs' said canals, as alleged in said complaint;

That said owners and occupants claiming the right to the use of the said water, conveyed and distributed by said Montezuma Canal as hereinbefore set forth, have and claim, a prescriptive right to the appropriation, diversion and use of said water;

That for more than ten years next before the institution of said suit, defendant had been engaged in the diversion, conveyance and distribution of said two thousand miner's inches of

58 water of the Gila River to said lands owned and occupied as hereinbefore set forth and referred to;

And throughout all of said time defendant has been claiming and exercising the right to so divert, conduct, convey, use and distribute said two thousand miner's inches of the water annually flowing in said Gila River for and on behalf of said appropriators; that said diversion, conveyance, use and distribution of said water have been actual, continuous, uninterrupted, peaceable, open, notorious, exclusive, hostile and adverse to plaintiffs and those claiming the right to use the water conveyed by plaintiffs' said canals as alleged in plaintiffs' complaint; and to all the world;

That by reason of the facts hereinbefore set forth, defendant has and claims a prescriptive right to the user of said two thousand inches of the water of said Gila River necessarily required by said appropriators thereof in the cultivation of their respective lands.

Wherefore, defendant prays that plaintiffs' complaint may be dismissed with costs.

Dated February 6, 1905.

HERRING & SORIN, *Tucson,*
Attorneys for Defendant Montezuma Canal Company.

[Endorsed:] Filed February 9th, 1905. Frank Dysart, Clerk.

59 *Answer to Cross-complaint of San Jose Irrigating Co. et al.*

[Title of Cause.]

The Montezuma Canal Company, and its co-defendants hereinafter named, appearing herein by their attorneys Herring & Sorin, for answer to the cross complaint and counter claim of defendants the San Jose Irrigating Company, the San Jose Extension Canal Company, and their co-defendants joining in said cross complaint and counter claim, admit that they and each of them claim a right to divert water from the Gila River and to use the same.

Said Montezuma Canal Company and its co-defendants deny each and every other allegation in said cross complaint and counter claim contained.

The said co-defendants of the Montezuma Canal Company joining in this answer to said cross complaint and counter claim, and the lands respectively owned and occupied by them for the irrigation of which the right aforesaid to the water of the Gila River is claimed, are as follows, to-wit:

Here follows the names of each of said defendants so an-
60 swering with a description of the lands held by him.

Omitted at request of Appellant.

IV.

That said lands are all valuable and by irrigation produce large crops of grain, alfalfa, fruit and vegetables, but without irrigation are practically worthless; that the annual rainfall upon said lands is entirely insufficient to permit the cultivation of the same; that the water appropriated and applied to the cultivation of said lands as aforesaid is necessarily required continuously throughout the year;

V.

That as against the rights of the co-defendants of defendant the San Jose Irrigating Company and those claiming the use of
61 water diverted thereby from the Gila River by means of the San Jose Canal; the San Jose Extension Canal Company, and those claiming the use of the water conveyed by the San Jose Extension Canal; E. L. Tidwell, Dimon DeLeon, Dionidio Sanchez, Daniel Sanchez, Abel Sanchez, Santos Serna, Alisco Sanchez, Policarpio Serna, Adiel Sanchez, Juana Sanchez, Amadeo Tajardo, Ricardo Sanchez, Jesus Vaca, Toliveo Vaca, Juana Van Order, Jesus Montez, Abram Madrid, Bernardo Para, Abelina Mejia, Samuel Van Order, Ejinio Ortega Luis Vaca, Harry Van Order, Leonidas Sanchez, John Van Order, Adelina Van Order, Carolina Serna, John Brassea, Martin Marquez, J. P. Ford, Senovio Gonzales, Frank Dysart, Cerbero Bertoldo, Rejinio Chavarria, H. Bingham, Francisco Montez, Jesus Morales, Emilio Viala, Sisto Molino, Clara Furness, Andres Serna, George L. Morris, Victoriano Carrasco, Thomas Perea, Jesus Flores, Sisto Garcia, and Pompeyo Jaime, defendant alleges the fact to be that the question of priority of appropriation between defendant and the appropriators and users of water under defendant's canal and the

said above named co-defendants and their predecessors in interest was fully and finally determined in an action in the district court of the Second Judicial District of the Territory of Arizona, in
62 and for the County of Graham, in which action the Montezuma Canal Company, a corporation, was plaintiff and the said San Jose Irrigating Company, a corporation, *et al.*, were defendants, and in which action a judgment and decree was duly made by said court in behalf of the plaintiff and against the defendants; that plaintiff has the right and is entitled to have flow in said Montezuma Canal continuously from said Gila River at all times during the dry seasons of the year and when the water is low and scarce in said river, one thousand miner's inches of water, and has had and is entitled to have flow from said river into said canal two thousand miner's inches of water during the times of wet seasons of the year when the water is high and plentiful therein, as against each and all of the defendants in said action, which said decree was so made on the 17th day of February 1897.

Wherefore the said Montezuma Canal Company, and its said co-defendants pray that said cross complaint and counter claim be dismissed.

HERRING & SORIN,
Attorneys for Montezuma Canal Company et al.

[Endorsed:] Filed April 24th, 1905. Frank Dysart, Clerk.

63 In the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Graham.

SMITHVILLE CANAL COMPANY, LORENZO CUTLER, BRIGHAM H. Cluff, David C. Adams, Dorathy E. Smith, Ira Olsen, Charles M. Dyer, Marit Morales, Edward C. Phillips, Thomas Kimball, Cynthia Layton, A. E. Crawford, William Price, Lorenzo Watson, Nathan P. Warden, John Callen, Janie Bull, W. T. Webb, Henry Lines, Andrew Carlson, J. A. McBride, W. E. McBride, D. C. Judd, J. W. Allred, George Larson, Martin Martinson, J. G. Bigler, B. F. Whitmer, E. M. Allred, Louis Mattice, Louis Norton, F. W. Moody, Squire Reynolds, W. W. Crockett, Myron Hanchett, C. M. Beals, and James Mallon, Co-Partners under the Firm Name of Beals and Mallon; W. W. Damron, S. E. Allen, William Bratton, Thomas Preston, C. D. Haynie, Hyrum Weech, Hannah Boyd, John Saline, P. C. Merrill, Robert Ferrin, S. O. Williams, Joseph Pennsyl, Geo. W. Williams, John Taylor, J. H. Nuttall, Sarah Fuller, W. F. Follett, J. F. Shields, J. H. Beal, S. J. Simms, Central Canal Company, H. Louis, John E., Hiram L., William R., and James B. Norton, Co-partners under the Firm Name of H. Louis Norton and Brothers; Julia A. Daley, George Shirts, Jacob J. Bigler, George A. Bigler, Clarence M. Bigler, Joseph Bigler, H. F. Norton, A. L. Norton, Elizabeth Layton, Samuel Cla-
64 ridge, J. G. Allred, Manuel Palma, Miguel Gonzales, Servera Serrano, Eugene Carruthers, Charles Francis, Miles Ray, Daniel Eldridge, William B. Johnson, Ann Pace, Erastus S.

Carpenter, Jacob J. McGuire, M. M. Smith, Mary Ann Carpenter, James M. Moody, Sarah F. Heywood, Joseph N. Heywood, Spence C. Heywood, Ella Heywood, Leland Heywood, David E. Heywood, Sarah V. Heywood, Robert F. Heywood, Irving Y. Heywood, heirs at law of J. N. Heywood, deceased; Edwin Moody, Susan Ann Claridge, Rose Dodge, Hezekiah Stowe, Joseph Cluff, Joseph E. Cluff, William Carpenter, John H. West, Eliza Welker, Frank N. Tyler, Hyrum Brinkerhoff, William K. Cluff, James N. Duke, Christian Madsen, D. W. Cluff, Robert E. Lee, A. S. Porter, W. B. Coombs, Edith Kunz, Manuel Burnel, W. E. Platt, Clarence Woodcock, William Ballard, S. E. Reynolds, Oren Follett, William Follett, J. R. Hamlin, Edward Drew, Elizabeth Craig, W. D. Saline, J. Y. Hendricks, Huldah Mathewson, William Reynolds, W. A. Smith, Isaac Follett, D. W. Cluff, Sr., Jane Cluff, J. A. McBride, Jr., D. C. McBride, Ann Holliday, W. F. Butler, Mary Magnum, D. M. Rogers, Alfred Rohner, W. E. Jones, L. P. Judd, Lucy Kelly, Samuel Lines, J. H. Lines, Janetta Ferrin, Sarah Taylor, Joseph East, William Hundley, Frederick Webb, J. W. Foster, Lucinda Gustafsen, Lyman Dodge, Milton Lines,
65 W. C. Taylor, H. W. Crockett, S. S. Marshall, N. J. Roseberry, John Mattice, Frank Kirby, Cynthia Rogers, J. S. Beals, H. J. Anderson, F. R. Taylor, William Mallon, Andrew Carlson, Jr., Joseph Alder, C. M. Beals, J. D. Boyd, W. B. Ballard, George Ballard, John Cluff, Elizabeth Fuller, Terence O'Bryan, Samuel Williams, Smithville Irrigation and Manufacturing Company, M. W. Ray, Frank Preston, J. D. Haynie, C. N. Birdno, H. L. Norton, J. B. Norton, Isaac Follett, S. E. Collins, Lucinda Merrill, W. A. Smith, Hollis Holliday, Mrs. B. Hawes, Susan Saline, Rebecca Cluff, A. J. Dodge, Charles Keeler, C. R. Norton, Thomas Dodge, Warren Follett, William Ransom Thomas East, Gerald Merrill, William Whipple, Chirachua Cattle Company, a corporation; Mary Olsen, Angus Whitmer, Moses A. Cluff, William Price, O. B. Williams, Plaintiffs,

vs.

Oregon Irrigation and Canal Company, I. T. Kempton, K. V. B. Talley, Benjamin Echols, —— Howard and —— Nelms, J. B. Blair, T. S. Kimball, and Orval Larson, Bert Hoopes, A. A. Allred, A. T. West, Free Hubbard, F. F. Hubbard, Mrs. A. Hubbard, Mrs. L. P. Merrill, J. I. Palmer, H. B. Bryce, R. A. Bryce, S. S. Marshall, A. W. Chesley, J. A. Golding, G. W. Lemon, W. Wamsley, Ed Chesley, N. Holyoak, Lyman Hancock, S. F.
66 Murphy, G. O. Peck, J. P. Walker, J. H. Nuttall, G. H. Killian, G. A. Bryce, T. B. Nelson, Frank A. Cluff, H. Stockton, M. Carpenter, D. H. Claridge, J. H. Porter, John Felshaw, A. N. Bryce, Simon Matthews, Layton Town Canal Company, Austin Evans, Jas. T. Owens, Oscar Layton, Eveline Olsen, Arthur Welker, John Welker, Raymond Welker, Adam Welker, Moses Steele, Wm. Ellsworth, Wm. R. Smith, Chas. A. Warner, J. B. Quinn, Wm. Welker, Elam Olsen, Nancy Rollins, Anna Robinson, John Madsen, Jesse Quinn, Jerry Hatch, Geo. W. Quinn, Geo. Foote, Hyrum H. Tippets, J. R. Welker, J. J. Quinn, Joseph

Greenhalgh, Robt. Peel, W. B. Fonda, Frank Dysart, Janette Smithson, Thomas Bell, John West, Adam Welker, Jr., Thomas Richards, Wm. Saulsbury, Geo. Giles, Robt. McAllister, John Clifford, M. P. Snow, W. A. Meyers, John W. Morris, Geo. Quinn, Wm. Morris, E. T. Ijams, Harriet Crandall, W. R. Reed, James Corder, A. J. Perkins, Joseph Bingham, Richard Bingham, J. L. Woods, John Lee, Lehi Smithson, Bettie Holladay, Aaron Cheney, Joseph Paulson, J. B. Whitton, Alonza Bingham, Allen Cupp, L. B. Stephens, Augusta Jorgernsen, W. Reed, J. N. Keasley, Wm. Posey, J. W. N. Scarlett, L. B. Scarlett, Melvin Montierth, Charles Freestone, A. H. Packer, Richard Layton, David Lee, Richard Bingham, W. H. Clifford, C. R. Freeman, J. L. Freeman,
67 Ernest Ellsworth, Jesse J. Quinn, Geo. H. Killian, Wm. W. Pace, Aaron E. Cheney, John G. Morris, Lucy B. Guenther, Reuben Fuller, School Lot, A. E. Turner, Joe Greenhalgh, James Stukey, R. A. Smith, Leonard Freestone, James Freestone, Wm. C. Hoopes, Benjamin Maurer, Wm. J. Packer, Mormon Church Lot, M. M. Crandall, Geo. Olney, Geo. Jacobson, Wm. H. Roach, Christopher Wish, Ira Kempton, Mrs. C. L. Wish, estate of C. L. Wish, Terrence O'Bryan, Maury Grider, Mrs. Emma McGowan, Geo. W. Todd, Austin Evans, Robt. Morris, Z. C. Prina, F. W. Hayes, Wm. Rollins, P. J. Jacobson, Hyrum Bingham, Alice K. Beebe, H. J. Dowdle, Ray Kemp, Paul Beebe, A. J. Perkins, Wm. Beebe, N. P. Beebe, Heber Layton, Mrs. Ira Elmer, John Hoopes, C. A. Callison, Thomas S. Merrill, S. P. Crum, Henry Carnes, Martin Echols, H. Layton, Wm. Johns, J. B. Pace, Richard Layton, John Bilby D. J. Ellsworth, Hal Merrill, Simeon Drollinger, Martin Martensen, Seth Merrill, J. Craig, Sam Echols, Frank Fuller, Cyrus Robinson, W. W. Wild, I. P. Robinson, Frank Robinson, Abraham Bowman, Andrew Kimball, Wm. Moody, Mrs. — Sessions, Mrs. John Hoopes, Andrew J. Kimball, S. Stinson, Alvin Montierth, Josie Cluff, Robert Tyler, Reuben Bingham, Wm. Posey, Joseph Allred, Alfred A. Barney, Sunflower Canal Company, Chirachuca Cattle Company, Mon-
68 tezuma Canal Company, Vicente Saurez, Manuel and Francisca Grijalva, J. W. N. Scarlett, Abraham Diaz, Merahildo Grijalva, Bernardo Telles, Christine Grijalva, J. D. Hartzler, Blas Ortiz and Francisca Chavarria, I. E. Solomon, Wm. A. Gillespie, Wm. Gillispi, Geo. A. Olney, Mrs. S. W. Pomeroy, E. L. Tidwell, William Morris, Robert Nash, Joseph Corder, Joseph Dial, W. J. Richards, M. F. Swanger, Augustine Jorquez, Joaquin Padilla, Ramon Guana, Antonio Ruiz, Jr., Evaristo Reos, Thomas Blake, Matthew O'Bryan, Antonio Ruiz, Jessie Quinn, Jno. W. Morris, Pedro Marquis, John Green, Francisco Miranda, Lucio Cordero, Geo. D. Briar, Mrs. Emma McGowan, H. S. Palmer, Walter F. Barney, Benjamin Peel, Frank Freestone, Geo. L. Freestone, Benjamin Echols, Henry Dial, Walter Truesdale, G. W. Carness, Harry Clifford, Geo. Gambel, O. C. May, Victoria Garcia, Jas. T. Owens, Oscar Olsen, Eveline Olsen, Arthur Welker, John Welker, Ramond Welker, Adam Welker, Wm. R. Smith, Chas. A. Warner, J. B. Quinn, Wm. Welker, Elam Olsen, Geo. W.

Quinn, Hyrum H. Tippets, J. J. Quinn, Joseph Greenhalgh, Janette Smithson, Thomas Bell, John West, Adam Welker, Thomas Richards, Wm. Saulsburg, John Clifford, W. A. Meyers, John W. Morris, Wm. Morris, School Lot, A. E. Turner, Joe Greenhalgh, R. A. Smith, Leonard Freestone, James Freestone, Wm. C. Hoopes, Benjamin Maurer, Wm. J. Packer, Mormon Church Lot,
69 M. M. Crandall, Wm. H. Roach, Christopher Wesh, Irs Kempton, Maury Grider, Geo. W. Todd, J. C. Prina, P. J. Jacobson, Alice Beebe, Joseph Bingham, Paul Beebe, Wm. P. Beebe, N. P. Beebe, W. R. Reed, James Corder, Richard Bingham, J. L. Woods, Bettie Holladay, Joseph Poulson, J. B. Whitton, Allen Cupp, L. B. Stephens, R. L. S. Scarlett, Richard Layton, David Lee, W. H. Clifford, C. R. Freeman, J. L. Freeman, Ernest Ellsworth, John G. Norris, Lucy B. Guenther, Heber Layton, Mrs. Ira Elmer, John Hoopes, C. A. Callison, Thomas S. Merrill, H. Layton, William Johns, J. B. Pace, John Bilby, D. J. Ellsworth, Hal Merrill, Simeon Drollinger, Marten Martenson, Seth Merrill, J. Craig, Sam Echols, I. P. Robinson, Frank Robinson, Andrew Kimball, William Moody, Mrs. Sessions, Mrs. John Hoopes, Andrew J. Kimball, Alvin Montierth, San Jose Irrigating Company, San Jose Extension Canal Company, B. B. Adams, Jesus Ayres, Alma N. Bennett, W. A. Bennett, Annie Austin, W. T. Barney, A. F. Barnett, H. W. Bishop, Alice A. Bishop, F. W. Bishop, Innocent Bartoldi, Jose Bartoldi, A. Curtis, Samuel Curtis, C. and E. Carraco, Fernando Cervantez, Jesus Carrasco, Jesus and Petra Carasco, W. F. Clark, B. R. Clark, John Cline, Fred Dysart, Lina M. Dudley, J. C. Epley, George Evans, John Evans, E. J. Edwards, John H. Evans, Angel Franco, Joaquin Figerroa, Amalia
70 Freudenthal, Mrs. Julia M. Fitzgerald, C. Garcia, Graham County, Gillespie and Freudenthal, Vicent Grecio, Tomas Garcia, Jesus Garcia, Luther Green and estate of N. Green, Luther Green, C. W. Hoopes, T. T. Hunter, Mrs. J. F. Judia, Wiley E. Jones, Wm. Johns, A. A. Johnson, Mary Lacy, Daniel Layman, H. M. Merrill, Morris Martinella, Joe Martin, Montezuma Flour Milling Company, H. S. Mashbir, M. E. Church, South, Alice Merrill, A. Mejia, Ayaline Mejia, J. I. Massey, Mrs. O. C. May, Elizabeth M. May, Oliver C. May, A. G. McAllister, C. E. Moorman, W. L. Nelson, T. O'Bryan, J. T. Owens, William H. Parks, W. H. Parks, Mrs. Lillian E. Parks, D. B. Ryan and Minnie M. Ryan, Jennie V. Rawlins, Frank Richardson, Lena Richardson, C. L. Rawlins, R. B. Smith, Solomonville Townsite, John See, John S. See, Mrs. George Stevens, Charles L. Solomon, Mitt Simms, School District No. 5 Graham County, M. A. Sothlee, Louis Sais, E. M. Simpson, Mrs. Anna Solomon, Felipe Topia, H. C. Ussher, S. L. Usher, W. A. Wilson, W. R. Waldrop, Union Canal and Irrigation Company, T. G. Webster, George E. Webster, Frank Webster, Oscar Webster, Reese Webster, William Johns, Eugene Montierth, Peter Andarsan, P. Estrado, F. E. Braley, P. J. Jacobson, Fred Thorstensen, H. E. Dunlapp, W. R. Waddill, Thos. S. Merrill, Jr., Benjamin Perkins,

M. M. Smith, Elizabeth Pace, A. O. Lamreaux, W. M.
71 Price, R. G. Layton, Isaac Coombs, Jesse Wanslee, Joseph E. Corder, J. N. Porter, M. C. Taylor, School District No. 1, Morrell P. Snow, Wm. D. Johnson, Wiley E. and Phoebe Jones, Nellie A. Sullivan, John Hill, Joseph G. Allred, D. A. Despane, F. W. Moody, Oscar G. Layton, Al. Barney, J. P. Pace, Nancy Pace, H. C. Pace, Jesse C. Phillips, Susan Claridge, C. M. Layton, John Shiflets, Frank Taylor, Orlando Jolly, C. G. Curtis, Will Carpenter, Erastus Carpenter, C. N. Nichols, Cynthia Layton, D. P. Cole, I. P. Robinson, Mary A. Hoopes, Elizabeth Layton, Frank Layton, Frank Wightman, Charles B. Jones, W. H. Thomas, Dan Kemp, James Blazzard, J. M. Moody, Anna Carpenter, W. E. Platt, George Hoopes, Josephine and Emma Cluff, Will Olerton, Dan Eldridge, Hester M. Damron, Charles and Parley McRea, Lillian Claridge, A. C. Peterson, Elizabeth Moody, J. E. Hunt, William Brown, John Hoopes, Jr., Robert Hill, Alexander Hunt, John Allen, Leslie Layton, August McRea, S. M. Messinger, H. M. Fugett, Elizabeth Robinson, H. Brinkerhoff, Barbara Layton, L. D. S. Academy, Andrew Woods, D. B. Barney, Will Damron, Robert H. Bears, Lorenzo Cutler, Hyrum Clarson, H. N. Chlarson, J. D. Love, John Daley, Wm. M. Damron, Wilson Lambert, H. L. Johnson, Thomas Naylor, Ed. C. Phillips, David Phillips, Andrew Foley, J. P. Lee, J. N. Heywood, H. L. Gard-
72 ner, M. M. Smith, Roanna Smith, Iles Rawlins, Susanah Olerton, Andrew Kimball, Emma Porter, Joseph Knudson, Taylor Brown, Sarah J. Lewis, Samuel Curtis, C. N. Chlarson, Samuel Claridge, School District No. —, William Moody, Theodore Moody, A. E. Crawford, Thos. Moody, Walter Rhoads, J. S. Russell, L. G. Moody, Harry W. Layton, Alva S. Porter, Central Ward Church, L. D. S., R. D. Motes, D. Ellsworth, School District No. —, B. F. Whitmer, Tithing office L. D. S. at Cent-al, Joseph E. Cluff, R. E. Lee, J. C. Pursley, Lillie Morris, Ella M. Birdno, H. L. Castle, Martin M. Jacobson, Fred B. Jacobson, Mary E. Madsen, T. E. Rose, Jacob McGuire, Marthe Moorman, James Ellsworth, Geo. D. Brier, Louisa McFarland, Lucy M. Tuttle, A. E. Jacobson, The Kempton Canal Company, W. M. Blair, W. H. Colvin, J. D. Colvin, Frank Curtis, F. J. Fuller, John Harper, Owen Hancock, J. A. Hancock, Elijah Hancock, Erastus Hancock, Levi Hancock, Samuel N. Higgins, Heber Higins, John Holladay, C. R. Jennings, A. B. Kempton, A. J. Kempton, R. A. Kempton, Asa B. Kempton, David Markham, A. F. McEuen, B. E. Norton, W. T. Oliver, I. Palmer, E. Palmer, I. J. Palmer, John H. Plumb, J. S. Tanner, Joseph Thatcher, Lorenzo Thatcher, Fred Webb, Alroy Wilkins, Bryce Irrigation Canal Company, Phil C. Merrill, J. P. Walker, Charles Nelson, John A.
73 Raper, Orson Nelson, Mrs. M. Freestone, H. B. Bryce, A. N. Bryce, W. E. McBride, R. P. Rohner, Mrs. L. P. Merrill, C. A. Bryce, R. A. Bryce, E. P. Bryce, J. W. Bryce, C. E. Norton, Curtis Irrigating Milling and Manufacturing Company, Wm. Blair, W. R. Carter, Jr., M. M. Curtis, Mary C. Clark, L. M. Colvin, Moses Curtis, Malina Curtis, Elizabeth Fuller, Thomas A.

Fuller, Francis J. Fuller, Levi Hancock, John H. Halliday, Wiley Holladay, John Harper, Joel Huff, W. W. Hawkins, A. B. Kempton Bishop, Richard A. Kempton, David Markham, Ed. McEuen, A. Mecham, Emanuel Palmer, Loretta Plumb, D. M. Rogers, John Plumb, Relief Society, H. Stockton, School District No. 11, John Saline, E. W. Thompson, John Tyler, Elroy Wilkins, The Nevada Irrigating and Canal Company, C. B. Boren, E. L. Carter, I. A. Follett, Joseph Foster, Joseph Greenhalgh, Lehi Larson, Oliva Larson, Eliza Matthews, D. H. Matthews, Peter H. McBride, Louisa Rogers, Charlotte Wilkins, W. A. Carter, Joseph E. Follett, Rhoda Foster, George A. Gourley, L. Hunsacker, James M. Larson, James P. Lindsey, Charles A. Matthews, A. Macham, Peter A. Norton, John S. Waddill, Frank Wooten, Military Canal Company, T. K. Werden, Juan Garcia, Anton Christensen, Charles Briner, Chris C. Christensen, Oliver Elmer, George W.
74 Wyatt, Char-es N. Rose, W. M. Reay, Abe Winsor, J. W. Ballard, George F. Hunter, John Stowe, —— —— and Mrs. S. J. Black, Fort Thomas Canal Company, George Reynolds, W. A. Bowles, John Wise, W. S. David, Joseph York, D. Q. Thurlo, Free Hubbard, G. W. Healy, George F. Hunter, G. W. Wyatt, Dodge Canal Company, Jennie Bull, N. P. Werden, James Mack, Edd Carter, James Larsen, C. D. Borne, Howard McBride, H. J. Anderson, Francis Kirby, Joseph Foster, Peter McBride, W. A. Carter, Peter Norton, Joseph Greenhalgh, Charles Mathews, Elizabeth Mathets, Graham Canal Company, P. O. Peterson, George Skinner, D. V. A. Talley, Mrs. J. S. Wilson, R. A. Smith, Jr., J. M. Talley, J. T. Talley, W. H. Mulleanux, George Stewart, Eva Messinger, Joseph E. Blair, John Hancock, Nancy Mattice, J. C. Wanslee, John E. Golding, Moroni Skinner, J. C. Jolson, Mrs. C. H. Spafford, I. T. Kempton, Pratt Stewart, William Blaid, T. E. Harris, J. A. Allen, Joseph Hunt, John Doe Allred, V. T. Platt, Wm. M. Morris, A. Mulleanux, K. B. V. Talley, Mrs. Alex. Stewart, T. S. Kimball, Mrs. Thornton Lambert, Frank Butler, Sanchez Canal, Ricardo Sanchez, Leonidas Sanchez, Daniel Sanchez, Demas de Leon, Torebio Baca, John H. Van Order, Jesus Baca, Lorenzo Sanchez, Abel Sanchez, Santos Serna, Eliseo
75 Sanchez, Jesus Montez, Abelino Mejia, Abran Madrill, Jose Perea, Mejia Canal, H. Bingham, Berebero Bertoldo, Regino Chavarria, John Brassea, Fourness Canal, Francisco Montes, Jesus Morales, Emilio Vialla, Sixto Molino, Clara Fourness, Anreas Serna, George L. Morris, Victoriano Carrasco, Tomas Perea, Jesus Flores, R. A. Smith, Jr., Jacob Pulsifer, D. B. Williams, W. R. Waddill, Myrtle O. Goodspeed, George D. Brier, George T. McIntyre, David Anglo, E. L. Tidwell, Dimeon De Leon, Dionidio Sanchez, Pelicarpio Serna, Adiel Sanchez, Juana Sanchez, Amedeo Jajardo, Jesus Vaca, Tolivio Vaca, Juana Van Order, Abran Madrid, Bernardo Parra, Samuel Van Order, Ejinio Ortega, Luis Vaca, Harry Van Order, John Van Order, Adelina Van Order, Carolina Serna, Martin Marquez, J. P. Ford, Senovio Gonzales, Cerbero Bertoldo, Rejinio Chavarria, H. Bingham, Francisco Montez, Jesus Morales, Emilio Viala, Sisto Molino, Andres Serna,

Sisto Garcia, Pompeyo Jamie, John Reid, Charles Reynolds, Robert Pringle, Freeman M. Hubbard, Louis Zeckendorf and Albert Steinfeld, Co-Partners under the Firm Name of L. Zeckendorf and Company, Defendants.

76 *Findings of Fact.*

This cause having been called regularly for trial before the court; a jury trial having been expressly waived by the parties in open court, Joseph Campbell, Esq., appeared as attorney for the plaintiffs and J. H. McCollum, Esq., C. L. Rawlins, Herring & Sorin, Walter Bennett, Esq., T. S. Bunch, Esq., E. W. Lewis, Esq., A. G. McAllister, Esq., Wiley E. Jones, Esq., C. E. Moorman, Esq., and Lee N. Stratton, appeared as attorneys for the defendants and the court having heard the proof of the respective parties and considered the same and the arguments of the respective attorneys thereon and the cause having been submitted to the court for its decision upon briefs filed by the respective attorneys and the court having examined the documentary evidence offered by the respective parties and the records and the papers in the case and the briefs of the respective attorneys thereon now finds the following facts:

I

That the individuals named as parties plaintiff and defendant own, or are in possession of, the land irrigated by the water diverted by and carried through the several ditches and canals mentioned herein and are the appropriators of, or are successors in interest to the appropriators of waters from the Gila River through the said
77 ditches and canals with which such land has been and is now being irrigated. The lands originally reclaimed and irrigated by the water thus appropriated from the Gila River have been continuously irrigated and cultivated from the date of their reclamation to the present time.

The entire acreage of land thus irrigated and the heads and the entire lengths of the several canals herein mentioned are situated in the County of Graham, Territory of Arizona, and the acreage now in cultivation under the irrigation system referred to in this action aggregates 23,728 acres.

The different incorporated canal companies, who are parties plaintiff and defendant herein, are duly and regularly incorporated under the laws of this Territory and own and control the several canals as alleged in the pleadings herein which canals were originally operated by unincorporated partnerships or societies, and the present corporations, parties hereto, are the successors to the unincorporated owners of the several canals, and are in every instance carrying the water for the use of the land owners or the successors in interest of the land owners who were the original appropriators of the water carried therein for irrigation purposes. None of the parties hereto have been engaged or are now engaged in carrying water for hire, and none of the incorporated companies, parties hereto, have ap-

propriated any water in their corporate capacity. None of
78 the several parties hereto who are land owners, appropriators of water, or who are receiving water for irrigation from the different incorporated companies or through the several canals owned by the parties hereto have ever maintained their right to their several priorities as against the co-owners of land or co-users of water in their respective canals, but the individual land owners and appropriators of water that is furnished under the management of each of the several ditches or canals, herein referred to, have surrendered to their co-users in that canal their priority, and the water that is taken from the river for the use of the land under the several canals has been, by the consent of the different land owners under each canal, delivered to the different tracts of land in accordance with the extent of the interest in the ditch or canal of each land owner, regardless of the acreage cultivated by the said land owner, and regardless of the date when the said acreage was placed under cultivation.

II.

The priorities of each ditch or canal and the priorities of the users of water through each ditch or canal have been asserted and attempted to be maintained by each ditch or canal and by the owners of the land and appropriators of water under such ditch and canals as against all other ditches and canals, parties hereto, and
78½ the users of water thereunder.

II½.

The volume of water in the river available for the use of the several canals is not correctly indicated by the measurement of water at the head of the first canal, but the water supply is comprised of the volume that enters the river at that point, and the accretions thereto from the rise of the underflow, and the return of water from the land irrigated from the several canals and from other sources.

III.

The duty of water on the lands of the parties to this action is the equivalent to one half miner's inches continuous flow to the acre, reckoning 40 miners' inches to the cubic foot flow per second.

IV.

The total amount of water in the river in ordinary seasons is equivalent to one-half of one miner's inch per acre continuous flow for the acreage now irrigated from the Gila River through the several canals by the land owners who are parties to this action.

V.

The first point on the river of diversion of water for the irri-
79 gation of lands under any of the canals, parties hereto, is at the head of the Brown Ditch in Section 29, Township 6 South, Range 28 East; the last point of diversion is at the head of the Saline Ditch at the north-east corner of the south-east quarter of Section 35,

Township 4 South, Range 23 East, and about 41 miles distant in a westerly direction from the first point of diversion.

VI.

The parties to this suit or their predecessors in interest diverted water from the Gila River between these two points, and conveyed the same through the several ditches and canals mentioned herein to the lands owned by them, and used the said water thereon for irrigating and stock purposes between the years 1872 and 1904 at the several points and on the several dates as follows, to-wit:

In 1873 water was diverted from the south side of the river through the Montezuma Canal near the north-east quarter of Section 17, township 7 south, Range 27 east, and land was irrigated therewith, and land was irrigated therefrom that had been irrigated from a small ditch taken from the river near that same point in the year 1872.

In 1874 water was diverted from the south side of the river through the San Jose Canal near the south-east quarter of Section 35, Township 7 south, Range 27 east, and land irrigated therewith.

80 In 1874 water was diverted from the north side of the river through the Michelena Canal near the south-west corner of the north-east quarter of Section 3, Township 7, south, range 27 east, and land was irrigated therewith.

In 1874 water was diverted from the south side of the river through the Sunflower Canal near the south-west quarter of Section 10, Township 7 south, Range 26 east, and land irrigated therewith.

In 1874 water was diverted from the south side of the river through the Central Canal near the north-east corner of the north-west quarter of Section 8, Township 7 south, range 26 east, and land irrigated therewith.

In 1875 water was diverted from the north side of the river through the Oregon Canal near the south-west corner of the southeast quarter of Section 36, Tow*h*ship 6 south, Range 25 east, and land irrigated therewith.

In 1876 water was diverted from the south side of the river through the Thompson Ditch near the north-east corner of the south-west quarter of Section 7, Township 5 south, Range 24 east, and land irrigated therewith.

In 1877 water was diverted from the south side of the river through the Nevada Canal near the south-east corner of the north-west quarter of Section 18, Township 6 south, range 25 east, and land irrigated therewith.

81 In 1877 water was diverted from the south side of the river through the Collins ditch (afterwards called the Zeckendorf) near the north-east quarter of Section 19, Township 5 south, Range 24 east, and land irrigated therewith.

In 1877 water was diverted from the north side of the river through the Mejia Canal near the south-east corner of the south-west quarter of Section 31, Township 27 south, Range 6 east, and land irrigated therewith.

In 1879 the Union Canal was constructed and diverted water from the river on the south bank thereof, near the south-east corner of the northeast quarter of Section 13, Township 7 south, Range 26 east, and absorbed the Darby Ditch that had been built in 1876, and was extended westward so as to cover lands that had been theretofore irrigated from the Montezuma Canal, and now carries water for one hundred acres that was reclaimed in 1874, and irrigated by water that was then diverted from the river, and carried to the land by the Montezuma Canal, and also for all the land irrigated from 1876 to 1879 by water diverted and carried by the Darby Ditch.

In 1879 water was diverted from the north side of the river through the Graham Canal near the north-west quarter of Section 9, Township 7 south, Range 26 east, and land irrigated therewith.

82 In 1880 water was diverted from the south bank of the river through the Smithville Canal near the north-east quarter of Section 35, Township 6 south, Range 25 east, and land irrigated therewith.

In 1881 water was diverted from the south side of the river through the Dodge Canal near the north-east quarter of Section 20, Township 6 south, Range 25 east, and land irrigated therewith.

In 1881 water was diverted from the north bank of the river through the Curtis Canal near the south-east quarter of Section 12, Township 6 south, Range 24 east, and land irrigated therewith.

In 1882 water was diverted from the north bank of the river through the Kempton Canal near the north-east corner of the south-west quarter of section 3, Township 6 south, Range 24 east, and land irrigated therewith.

In 1883 water was diverted from the west bank of the river through the Sanchez Canal near the north-east quarter of Section 31, Township 6 south, Range 27 east, and land irrigated therewith.

In 1883 water was diverted from the north bank of the river through the Bryce Canal near the south-east corner of the south-west quarter of Section 22, Township 6 south, Range 25 east, and land irrigated therewith.

In 1884 water was diverted from the south bank of the river through the Reid Ditch near the center of Section 32, Town-
83 ship 5 south, Range 24 east, and land irrigated therewith.

In 1891 water was diverted from the south bank of the river through the Forness Canal near the north-east corner of Section 1, Township 7 south, Range 27 east, and land irrigated therewith.

In 1895 water was diverted from the south bank of the river through the Ft. Thomas Canal near the center of Section 29, Township 5 south, Range 24 east, and land irrigated therewith.

In 1895 water was diverted from the north bank of the river through the Saline Ditch at the north-east corner of the south-east quarter of Section 35, Township 4 south, Range 23 east, and land irrigated therewith.

In 1896 water was diverted from the west bank of the Gila River by E. L. Tidwell through the Brown Ditch near the north-west

corner of the south-west quarter of Section 29, Township 6 south, Range 28 east, and land irrigated therewith.

In 1896 water was diverted from the south bank of the river through the Military Ditch near the north-west corner of Section 1, Township 5 south, Range 23 east, and land irrigated therewith.

In 1889 or 1890 water was diverted from the south side of the river through the Clavenger and Maxie Ditch near the north-east corner of the south-east quarter of Section 4, Township 6
84 south, Range 24 east, and land irrigated therewith.

VII.

The water was diverted from the river for the purposes of irrigation through all of the ditches and canals above named, and land was reclaimed and put in cultivation therewith under the several canals on the dates and in the several amounts as indicated by the tabulated statement attached hereto, and marked "Names of Canals, Dates of Construction and Acreage Thereunder," showing the number of acres placed in cultivation under each of the several canals each year from 1872 to 1904. The tabulated statement showing the acreage in cultivation in the years 1874, 1875, 1876, 1877, and 1878, credits to the Union Canal the acreage for which water is now carried through the Union Canal at the request of the owners thereof, and which was before the construction of the Union Canal carried through the Montezuma Canal, and the Kannedy and Darby Ditch. The Collins Ditch, afterwards called the Zeckendorf, originally carried the water for the land cultivated in Section 1, 2, and 12, Township 5 south, Range 23 east, and the Clavenger and Maxie Ditch afterwards diverted water for the irrigation of land in Sections 13 and 19, and in 1901 Zeckendorf enlarged and extended it to cover the acreage theretofore irrigated under it and likewise the acreage originally irrigated from the Collins Ditch. The
85 conditions are such that water is, in dry seasons of the year available for the irrigation of these lands through the Collins Ditch at times when there would be no water available at the head of the Clavenger and Maxie Ditch.

VIII.

When there is a flow of 500 inches at the head of the Brown Ditch, being the first point of diversion on the river, the amount of accretions thereto from the rise of the underflow, the return water from irrigated land and other sources is represented approximately by the following figures:

At the head of the	Inches.
Montezuma	60
Union	15
Sunflower	75
Graham	40
Central	50
Oregon	40
Smithville	40

Bryce 25
Dodge 40
Nevada 40
Curtis 40
Kempton 40
Reid 40
Ft. Thomas.....50
Collins-Zeckendorf 40
Thompson 50
Military 75
Saline 30

86 Making the total accretions 790 miner's inches, that added to the 500 at the head of the system gives the grand total in the river of 1290 miner's inches, to be apportioned among the different canals.

IX.

When there is a surface flow of 7500 miner's inches in the Gila River at the head of the irrigation system, the accretions thereto in about the same proportion at the heads of the several canals and ditches as given in the statement just made, amounts to 4803 miner's inches making a total volume of water for distribution among the several canals of 12,803 miner's inches, which furnishes more than half a miner's inch to the acre for the entire acreage shown by the evidence in this case to have been in cultivation in the year 1904.

There is a greater flow than this amount during the larger part of the year so that the amount of water available for irrigation purposes is more than one half of a miner's inch per acre for a greater length of time each year than the time during which the supply is less than one half inch per acre.

XI.

On the 17th day of February 1897 a decree was entered in this court in action No. 505 wherein the Montezuma Canal Com-

87 pany was plaintiff, the San Jose Irrigating Company a corporation, Chiricahua Cattle Company, a corporation, Pedro Michelena and others were defendants, wherein it was adjudged and decreed that the plaintiff had the right and was entitled to have flow into the Montezuma Canal continuously from the Gila River at all times during the dry season of the year when water is low and scarce in said river, 1000 miner's inches of water, and was entitled to have flow from the said river into said canal 2000 miner's inches of water at times of wet seasons of the year when water is high and plentiful therein, as against each and all of the defendants in said action, and in which it was ordered adjudged and decreed that said defendants above named, and all persons claiming under them and each of them be perpetually restrained and enjoined from diverting or taking water from the said river above the head of the plaintiff's said canal, or *or* in any manner obstructing the flow of water in the said river, so as to prevent the said water from flowing in the bed of said river down the same, and therefrom into plaintiff's canal to the

full extent of a thousand inches during each and every dry season of the year when water is low and scarce, and also from in any manner preventing the said 2000 miner's inches of water from flowing down the channel or bed of said river, and from flowing therefrom into plaintiff's said canal during the wet seasons of the year when
88 water is plentiful in said river.

XII.

On the 18th day of September 1900 a complaint was filed in the District Court of the Second Judicial District in and for Graham County, Territory of Arizona, in action No. 797 in which the San Jose Irrigating Company was plaintiff and E. L. Tidwell, *et al.*, were defendants and on March 31, 1901, a stipulation was filed in the said cause No. 797, by and between the San Jose Irrigating company and its stock holders on the one hand and Frank Dysart, Pedro Michelena, and Frank McLean, using water on lands owned by them, through the Michelena Ditch, on the other hand, in which it was stipulated and agreed that the grantors and predecessors in interest of both parties made their original appropriation of the water of the Gila River at the same date or time and that neither should, as against the other, claim or attempt to prove any prior or superior right to any of the water of the said Gila River by reason of having been prior in date or time of making the original appropriation of the water of the said Gila river; and on the 29th of June 1901 a decree was entered in the said District Court in the said action No. 797 in which it was found and decreed by the Court that the first right to diversion, use and enjoyment of the water in the Gila River, after the prior appropriation of 1000 miner's
89 inches theretofore decreed to the Montezuma Canal Company was in the plaintiff, the San Jose Irrigating Company, its shareholders and stockholders to the extent of a perpetual flow of 1500 miner's inches, and in the defendants Frank Dysart, Alexander McLean, and Pedro Michelena, using water through the Michelena Ditch, to the extent of a perpetual flow of 500 miner's inches of water in the Gila River.

"That neither the plaintiff or defendants, users of water under the Michelena Ditch, have priority of right over the other to the use of the water of the said Gila River, but they shall have equal right thereto, and shall pro rate the flow of water in the Gila River in the above proportions in case of scarcity of water therein, or in case of a failure of a full flow of water in said river from any cause sufficient to supply each with the quantity herein decreed, to be the quantity to which each is entitled in point of time."

90	Names of canals.	Dates of construction and acreage thereunder.									
		1872	1873	1874	1875	1876	1877	1878	1879	1880	1881
1	Brown	....	....	....	....	....	....	....	....	....	....
2	Sanchez	....	....	....	....	....	....	....	....	....	....
3	Mejia	....	....	....	....	....	15	25	40	50	60
4	Fourness	....	....	....	....	....	....	....	....	....	....
5	San Jose	....	....	100	300	600	800	900	1100	1200	1300
6	Michelena	....	....	40	80	100	150	180	200	240	260
7	Montezuma	30	80	220	520	640	1000	1200	1500	1590	1620
8	Union	....	....	100	100	138	138	163	168	200	393
9	Sunflower	....	....	25	110	195	200	205	210	210	220
10	Graham	....	....	....	....	....	....	....	10	50	70
11	Central	....	....	150	170	185	300	600	600	750	775
12	Oregon	....	....	....	30	50	60	70	80	90	100
13	Smithville	....	....	....	....	....	....	....	....	350	650
14	Bryce	....	....	....	....	....	....	....	....	....	....
15	Dodge	....	....	....	....	....	....	....	....	....	60
16	Nevada	....	....	....	....	....	70	80	100	150	200
17	Curtis	....	....	....	....	....	....	....	....	....	30
18	Kempton	....	....	....	....	....	....	....	....	....	....
19	Zeckendorf-Clavenger	....	....	....	....	....	....	....	....	....	....
20	Reid	....	....	....	....	....	....	....	....	....	....
21	Ft. Thomas	....	....	....	....	....	....	....	....	....	....
22	Zeckendorf-Collins	....	....	....	....	....	40	40	40	40	40
23	Thompson-Chlanton	....	....	....	....	....	40	50	50	50	50
24	Military	....	....	....	....	....	....	....	....	....	....
25	Saline	....	....	....	....	....	....	....	....	....	....

	1882	1883	1884	1885	1886	1887	1888	1889	1890	1891	1892	1893	1894
1	....	....	....	....	....	....	....	....	....	....	....	....	....
2	....	5	5	5	5	110	125	135	135	275	300	350	350
3	80	100	150	190	220	220	220	220	270	280	300	320	320
4	....	....	....	....	....	....	....	....	....	260	260	260	260
5	1500	1600	1800	1900	1900	1900	2000	2050	2050	2100	2100	2200	2200
6	300	310	320	320	320	340	340	340	340	350	350	360	370
7	1710	1760	1800	1840	2000	2004	2040	2100	2160	2220	2280	2360	2400
8	403	474	540	1088	1600	1902	2040	2460	2680	2680	2740	2740	2800
9	220	225	235	245	255	265	270	280	290	300	320	320	320
10	112	176	176	225	280	320	362	430	460	510	590	590	590
11	875	1400	1775	1800	1950	1975	2000	2050	2300	2500	2550	2575	2600
12	150	180	190	200	370	400	410	450	500	530	600	625	650
13	900	1050	1130	1220	1300	1370	1500	1500	1600	1600	1625	1625	1650
14	....	45	45	95	145	155	160	190	190	345	355	375	380
15	100	140	180	220	260	300	340	380	420	420	450	450	450
16	250	300	350	400	450	500	550	600	650	700	700	700	700
17	80	160	480	540	600	700	700	750	800	800	800	800	800
18	30	225	550	700	740	760	800	850	850	850	850	850	850
19	....	....	....	....	....	....	....	....	....	....	....	....	....
20	....	....	4	12	20	25	30	30	30	30	30	40	40
21	....	....	....	....	....	....	....	....	....	....	....	....	....
22	80	80	160	160	240	240	250	300	300	300	300	500	259
23	50	160	200	200	200	200	200	200	200	200	200	200	200
24	....	....	....	....	....	....	....	....	....	....	....	....	....
25	....	....	....	....	....	....	....	....	....	....	....	....	....

91

	1895	1896	1897	1898	1899	1900	1901	1902	1903	1904
1	....	100	100	100	100	100	100	100	100	100
2	350	350	350	350	350	350	400	400	400	400
3	320	320	320	320	320	320	320	320	320	320
4	260	260	260	260	260	260	260	260	260	260
5	2250	2350	2360	2360	2400	2500	2600	2700	2800	3000
6	370	400	400	400	450	450	450	450	450	450
7	2440	2530	2620	2710	2900	3190	3280	3570	3660	3750
8	2800	2900	2900	2900	2900	2900	2900	2900	2900	2900
9	340	345	350	350	360	360	370	380	390	400
10	640	660	670	707	737	776	780	790	804	962
11	2625	2650	2650	2650	2675	2675	2675	2675	2675	2675
12	800	850	875	900	930	950	975	1000	1050	1100
13	1650	1680	1700	1700	1700	1750	1750	1760	1760	1760
14	380	400	415	415	430	430	445	445	515	515
15	450	450	450	450	450	450	450	450	450	450
16	700	700	700	700	700	700	750	750	750	800
17	800	800	800	800	800	800	800	800	800	800
18	850	850	850	850	850	850	850	850	850	850
19	....	....	....	....	....	....	....	....	....	....
20	50	60	70	80	80	80	100	100	100	100
21	25	59	100	100	300	560	760	760	860	960
22	250	250	250	250	250	250	250	500	500	500
23	200	200	200	200	200	240	240	240	240	240
24	....	250	300	400	400	400	400	400	400	400
25	30	30	30	30	30	36	36	36	36	36

92 *Conclusions of Law.*

As conclusions of law from the foregoing facts I find that the defendants, who are the persons or successors in interest to the persons who appropriated water prior to 1875 and applied it to the reclamation and cultivation of the first 500 acres of land under the Montezuma Canal, are the first in right to the use of the water of the Gila River within this irrigation system; that those now cultivating the 400 acres now irrigated by water diverted and carried through the Montezuma Canal are entitled to a prior right to 200 miner's inches of water to be carried through the Montezuma Canal; and, those who are cultivating the 100 acres irrigated by water diverted and carried through the Union Canal are entitled to have the water for that purpose carried through the Union Canal and by it delivered to them; that when there is a surface flow of less than 300 miner's inches it is impracticable to divide same into the small streams necessary to reach the different parties entitled thereto. Therefore for the economical use of the water the entire supply, when less than 300 inches, should be delivered to the Montezuma Canal; that when there is a surface flow of 500 miner's inches, at the highest point of diversion, the defendants William Ellsworth, H. M. Merrill, T. O'Bryan, H. C. Ussher, Evans & Carrasco, William Gillispie, P. H. Freudenthal, W. A. Bennett, William Johns, and Samuel Curtis, who are the persons or successors in interest to the persons
93 who in 1875 appropriated water for and applied it to the first 300 acres of land in sections 3, 9, 10, 15, 16, 17, and 18, and who are diverting and carrying water thereto through the San Jose Canal are entitled to 150 miner's inches.

Those who are diverting and carrying water through the Michelena Ditch are entitled to 35 miner's inches, and the water users

under the Montezuma to 360 miner's inches as shown by the acreage and the date of the reclamation thereof under the several irrigating systems, but by reason of the decree of this court in action No. 505 those under the Michelena Ditch are enjoined from using water until after 1000 inches passes to the Montezuma, and by reason of stipulation on file between the parties and the decree of this court in cause No. 797, the parties using water under the Michelena and San Jose Canals have no priority over each other, but are entitled to prorate the water in the river in ratio of three-fourths thereof for those using water through the San Jose, and one-fourth thereof for those using water through the Michelena, therefore under this decree the defendants above named under the San Jose will be entitled to 115 inches, and the Michelena to 35 inches, the Montezuma 375 inches, the Union 50 inches, the Sunflower 55 inches, the Central to 100 inches, the Oregon 40 inches, Smithville 40 inches, Dodge 60 inches, Nevada 40 inches, Curtis 40 inches, Kempton 40
94 inches, Reid 40 inches, Ft. Thomas 50 inches, Zeckendorf-Collins 40 inches, Thompson 50 inches, Military 75 inches, and the Saline 30 inches.

The word "inches" as used above and in other places throughout these findings and the decree herein means miner's inches, continuous flow and the parties are entitled to have the amount thus designated or its equivalent, for specified times, by turns, and the supply for the different water users must be adapted to this latter manner whenever necessary and practicable. The determination of this question will devolve upon the Water Commissioner in the distribution of water.

2. When the surface flow at the head of the irrigation system is 1500 inches, the Mejia will be entitled to 30 inches by right of the acreage in cultivation, and the date when reclaimed, but by reason of the decree of this court in cause 797 is enjoined from receiving said amount, and the canals are entitled to receive the water in the following amounts: San Jose, 550 inches; Michelena, 100 inches; Montezuma 900 inches; the Court finding as a conclusion of law in this case that although the Michelena, Mejia, and other canals above the Montezuma under the decree in cause 505 are compelled to permit 1000 inches to flow down the river to the mouth of the Montezuma, that the priorities of the users of water under the Union, Sunflower, and Central Canals entitle them to have 100 inches of
95 that amount pass the head of the Montezuma and go down the river for their use, so that while, as against the users above named, the Montezuma will be entitled to 1,000 inches, it is only entitled to 900 as against those lower down the river, who are not parties to the first suit. The users of water under the Union Canal will be entitled to 137 inches; Sunflower 100 inches; Central 313; Oregon 50; and the Smithville Canal will be entitled to 150 inches as against the canals above named, and those using water through them, but as to the canals that divert water from the river between the Smithville and the lower end of the irrigating system, the Smithville will be entitled to 300 inches, so that if for any reason there should be more than 150 inches in the river at the head of the Smithville Canal at that stage of water, the Smithville, as against the

canals lower down the river, will be entitled to such excess up to 300 inches, the Bryce 50 inches, Dodge 50 inches; Nevada 150 inches; Curtis 75 inches; Kempton 75 inches; Reid 94 inches; Ft. Thomas, 125 inches; the Zeckendorf-Collins 94 inches; Thompson 125 inches; Military 188 inches; Saline 62 inches.

3. The land owners and water users under the different canal systems are entitled to water from the river at the different stages of the flow therein in the several amounts as indicated by the tabular statement attached hereto and marked "Tabular Statement of amounts of water to which the water users under the several canals
96 are entitled at different stages of water in the river, showing the accretions to the surface flow at the head of the irrigating system, and giving the approximate amounts thereof at the head of the different canals," which statement shows the amount to which each canal is entitled for the use of its patrons at the different stages of the river, beginning at the stage of water which is evidenced by a surface flow of 300 inches at the head of the irrigation system and showing then the amounts to which each is entitled when the flow is 400 inches, 500, 750, 1000, 1500, 2000, 2500, 3000, 3500, 4000, 4500, 5000, 6000, 6500, 7500, 8000, 8500, 9000, 9500, 10,000, 11,000, and 12,000 inches. In this statement the amounts ordered distributed (in excess of one-half of a miner's inch to each acre) to the canals below the Smithville have been based on the amount of underflow rising at the head of the different ditches, to which no one below them is entitled, and has been thus ordered for that reason, and the canals are entitled to this amount when available, but in no instance will any of these canals be entitled to any injunctive relief against any other canals for the purpose of rendering such amount available until the acreage under such canal at the stage of water given shall show such canal to be entitled thereto for the purpose of furnishing one-half miner's inch per acre.

4. The appropriators of water under the different canal
97 systems are entitled to the distribution of water as shown by the tabulated statement by reason of their need of that amount of water for the irrigation of their land, and by reason of their ability to beneficially use the amount of water therein designated in every instance in the irrigation of their land and they will be entitled to this water so long as the present conditions continue, but in any instance where the conditions may become changed at any given time, their right to such use will be modified by this limitation to the extent of such change, so that they will be entitled to the amount for which the need may exist and which the parties can beneficially use at such given times.

5. The several incorporated companies, parties to this suit, carrying the water gratuitously for the appropriators of water under the several systems of distribution, have the right in their several corporate entities to carry the water by permission of the several appropriators of water and land owners and water users, and are justified for that reason as defendants in diverting and carrying such water if their right is challenged, but they have no right in the water, and no vested right or interest in the carrying thereof that would enable them to compel other parties to deliver water at the head of their

several canals in order to enable them thus to carry it. The
98 right to the use of the water and to have it carried and to have it delivered at a certain place for carrying exists in the several appropriators and users of water who, in this case, are the individual land owners who appropriated and beneficially used the water, or who are the successors in interest to those who appropriated and used it.

6. The several parties, plaintiff and defendant herein, who are owners of land and are receiving water from the different incorporated companies, never having maintained their right to their several priorities as against other co-owners and co-users, and appropriators under their several ditches, are stopped as against their other co-owners and users under the same canal from the assertion of their right of priority as evidenced by the dates of their several appropriations and reclamations of land, but the users under each canal system having contended for their priorities as against each other canal system or rival as a ditch company or as an aggregation of individuals are entitled as against such other canal or ditch or the users of water thereunder to their priorities as shown by the acreage in cultivation and the different dates on which water was applied thereto for irrigation purposes.

7. The Zeckendorf canal is entitled to the water decreed to
99 it in this action if taken from the river at the head of the Collins Ditch in the north-east quarter of Section 19, Township 5 south, Range 24 east, and is entitled if it should so prefer, to take that water from the river at the head of the Clavenger and Maxie Ditch near the north-east corner of the south-east quarter of Section 4, Township 6 south, Range 24 east, whenever the stage of water in the river is such that the water can be diverted at this point without interfering with the delivery through the Ft. Thomas canal of the amount of water to which the users thereunder are entitled. When that can not be done, or when by reason of the amount taken from the river for the Kempton and Curtis Canal, there is not a sufficiency at the head of the Clavenger and Maxie Ditch, the Zeckendorf is entitled to have the amount herein decreed it taken from the river at the head of the Collins Ditch.

Signed and filed this tenth day of February, 1906, as of 28th day of April, 1905.

FLETCHER M. DOAN, *Judge.*

100 *Tabular Statement of Amounts of Water to which the Water Users under the Several Canals are Entitled at Different Stages of Water in the River, Showing the Accretions to the Surface Flow at the Head of the Irrigating System, and Giving the Approximate Amounts Thereof at the Heads of the Different Canals.*

Supply	1875	....	1878	....	1880	....	1882	....	1883	....	1884	....	1885	....
300 At Head, 400..	500	....	750	....	1000	....	1500	....	2000	....	2500	....	3000	....
Accretions	....	790	....	1290	....	1540	....	1926	....	2214	....	2442	....	2681
Distribute	....	....	Dist.	....	Dist.	....	Dist.	....	Dist.	....	Dist.	....	Dist.	....
	....	Acc.	....	Acc.	....	Acc.	....	Acc.	....	Acc.	....	Acc.	....	Acc.
Brown	....	....	....	....	....	....	....	....	....	....	....	....	....	....
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Sanchez	....	....	....	....	....	....	....	....	....	....	....	....	....	....
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Mejia	....	....	....	....	....	....	30	....	35	....	60	....	70	....
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Fourness	....	....	....	....	....	....	....	....	....	....	....	....	....	....
60 ——— 120..	150	....	320	....	480	....	....	....	....	....	....	....	....	....
47 San Jose, 94.....	115	....	260	....	400	....	550	....	600	....	800	....	900	....
13 ——— 26.....	35	....	60	....	80	....	....	....	....	....	....	....	....	....
13 Michilena 26....	35	....	60	....	80	....	100	....	110	....	150	....	160	....
	360	....	....	....	....	....	....	....	....	....	....	....	....	....
245 Montezuma, 290.	375	60	500	100	640	120	900	150	1000	172	1000	189	1000	207
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
20 Union, 30.....	50	15	55	25	70	30	137	37	180	43	240	47	444	53
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
30 Sunflower, 30....	55	75	65	125	70	150	100	188	100	215	110	236	120	260
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Graham	....	40	....	60	....	80	....	100	60	115	60	126	75	138
	....	....	....	....	....	....	....	....	....	....	....	....	....	....

Tabular Statement of Amounts of Water, etc.—Continued.

50 Central 80.....	100	50	200	80	250	100	313	125	600	144	716	158	800	173
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Oregon	40	40	55	60	45	80	50	100	50	115	60	126	75	138
Smithville	40	40	65	60	115	80	150	100	185	115	312	126	453	138
	....	....	....	....	....	....	300	....	550	....	565	....	610	....
Bryce	....	25	....	40	50	50	50	62	50	72	50	80	48	88
Dodge	60	40	60	60	50	75	50	94	90	108	90	120	110	132
Nevada	40	40	100	60	100	75	150	94	150	108	150	120	194	132
Curtis	40	40	60	60	75	75	75	94	90	108	150	120	132	132
Kempton	40	40	60	60	75	75	75	94	112	108	120	120	132	132
Zeckendorf-Clavenger	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Reid	40	40	60	60	75	75	94	94	94	108	94	120	94	132
Ft. Thomas	50	50	80	80	100	100	125	125	158	144	184	158	211	173
Zackendorf	40	40	60	60	75	75	94	94	118	108	120	120	130	130
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Collins	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Thompson	50	50	80	80	100	100	125	125	144	144	185	185	173	173
Military	75	75	120	120	150	150	188	188	215	215	236	236	260	260
Saline	30	30	40	40	50	50	62	62	72	72	80	80	88	88
	....	....	....	....	....	....	....	....	....	....	....	....	....	....
	....	1290	....	2045	....	2540	....	3426	....	4214	....	4942	....	5681
Total in River.....	....	....	2040	....	2570	....	3418	....	4213	....	4967	....	5671	....
Total Dist.	1280													

101 The tabular statement for the year 1904 of amounts of water to which the water users under the several canals are entitled at different stages of water in the river, showing the accretions to the surface flow at the head of the irrigating system, and giving the approximate amounts thereof at the heads of the different canals, is omitted by stipulation between counsel.

	1886	....	1888	....	1889	....	1890	....	1893	....	1897	.....	1899	.....	1902	.....
	3500	....	4000	....	4500	....	5000	....	5500	....	6000	.....	6500	.....	7000	.....
	....	2926	....	3156	....	3345	....	3512	....	3679	....	3862	.....	4055	.....	4257
	Dist.	....	Dist.	....	Dist.	....	Dist.	....	Dist.	....	Dist.	.....	Dist.	.....	Dist.	.....
	....	Acc.	....	Acc.	...	Acc.	....	Acc.	....	Acc.	....	Acc.	.....	Acc.	.....	Acc.
1	....	....	....	....	....	....	....	....	....	....	20	.....	50	.....	50	.....
2	....	....	30	....	40	....	40	....	150	....	150	.....	180	.....	180	.....
3	90	....	100	....	110	....	142	....	160	....	160	.....	160	.....	160	.....
4	....	....	....	....	....	....	....	....	....	....	60	.....	130	.....	130	.....
5	950	....	1000	....	1025	....	1076	....	1100	....	1100	.....	1200	.....	1375	.....
6	160	....	170	....	170	....	178	....	180	....	200	.....	225	.....	225	.....
7	1000	225	1000	243	1050	257	1133	270	1180	283	1300	297	1500	312	1700	328
8	800	57	1000	62	1200	66	1380	69	1380	72	1450	74	1473	76	1475	81
9	120	284	135	306	140	324	152	340	160	356	175	374	180	393	190	413
10	100	150	156	162	215	172	241	181	270	190	300	199	370	209	390	219
11	900	190	980	205	1025	217	1150	228	1250	239	1325	251	1337	263	1340	276
12	120	150	205	162	225	172	262	181	300	190	430	199	465	209	500	219
13	466	150	523	162	673	172	690	181	690	190	800	199	850	209	860	219
	650	....	750	....	750	....	840	....	840	....	850	.....	.....	.....	.....	.....
14	60	96	60	104	65	110	95	115	100	120	133	126	140	132	194	139
15	120	144	140	155	155	164	165	172	200	228	200	239	225	251	225	263
16	204	144	214	155	218	164	220	172	276	228	304	239	345	251	375	263
17	144	144	155	155	164	164	172	172	228	228	239	239	251	251	263	263

18	144	144	155	155	164	164	172	172	228	228	239	239	251	251	289	263	
19	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	
20	94	144	94	155	94	164	94	172	94	228	94	239	94	251	100	263	
21	236	190	256	205	268	217	280	228	293	239	313	251	329	263	439	276	
22	144	144	165	155	183	164	198	172	808	228	223	239	342	251	263	263	
23	190	190	190	205	217	217	228	228	239	239	251	251	263	263	276	276	
24	284	284	321	306	324	324	340	340	356	356	373	373	392	392	412	412	
25	96	96	104	104	110	110	115	115	120	120	125	125	132	132	139	139	
	6422	6426	7153	7156	7835	7845	8523	8512	9162	9179	9964	10151	10784	10859	11550	11574	

102 *Judgment and Decree.*

[Title of Cause.]

Be it remembered, that on the 28th day of April, 1905, the same being a regular judicial day of the April Term of the said District Court, this cause came on regularly for trial before the court without a jury, a jury having been expressly waived by the parties in open court. The parties appeared in person and by their respective attorneys, and the court having heard the testimony of the witnesses and the arguments of counsel and having examined the documentary evidence, the records and papers introduced by both parties, the evidence was closed and the cause was submitted to the court for consideration and decision, and after due deliberation thereon and examination of the briefs filed by the attorneys of the respective parties, the court delivered its findings and decision in writing (filed herein) and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid it is ordered and adjudged and decreed; that the several parties to this suit are entitled to receive and are hereby authorized to divert and convey from the Gila River water sufficient, each for his or their lands, from time to time, in the amounts and in the order of priority as shown in the tabular statement hereto attached, and filed herewith, and marked "Tabular statement of amounts of water
103 to which the water users under the several canals are entitled at different stages of water in the river, showing the accretions to the surface flow at the head of the irrigation system, and giving the approximate amounts thereof at the head of the different canals."

And the several parties hereto are each hereby forever enjoined from in any wise obstructing or interfering with the rights of any of the other parties to this suit and for the purpose of carrying into effect this decree Albert T. Colton is hereby appointed a Commissioner of this court, to hold said office and exercise the powers and duties thereof, hereinafter prescribed, until a further order of this Court.

The said Commissioner shall have the power, at all time, when it shall be proper and necessary, in the discharge of his duties, to enter upon any and all of those certain canals and ditches known as the, Brown, Sanchez, Mejia, Fourness, San Jose, Michelena, Montezuma, Union, Sunflower, Graham, Central, Oregon, Smithville, Bryce, Dodge, Nevada, Curtis, Kempton, Zeckendorf-Clavenger, Reid, Fort Thomas, Zeckendorf-Collins, Thompson, Military, Saline, and upon each and every part thereof, and upon all the dams, gates, flumes and other structures and appliances, for the obstruction, diversion, or conveyance of water from said Gila River for the irrigation of lands under any or all of said canals, or ditches, and have supervision and direction of the placing of, changing, closing or opening, of
104 the same for the purpose of the discharge of his duties, and to direct the placing of proper gates, dams or other means for

the control of the water of said river at the heads of the canals or other points on the banks of said canals as he may direct, at the expense of the parties hereto interested therein and to make such rules and regulations as he may deem proper and expedient, to be observed, by the parties hereto, for the distribution and use of said water.

And it is further ordered that said commissioner shall in person, with the assistance of such help as he may need, superintend and control the distribution and use of water, by the parties hereto and by the proper practice direct the diversion of such water, from said river, and its conveyance to the place of use by whatsoever means he may deem best to secure the greatest economy therein. In the service of said water he shall direct the distribution thereof in accordance with the rights of the parties as to the extent of land irrigated and order of priority of time of appropriation as in this decree established. In the distribution and use of such water the Commissioner shall take as a basis of the supply necessary for the cultivation of said lands one-half of a miner's inch constant flow for each acre of land, or at that ratio, reckoning forty miner's inches as the equivalent to a flow of one cubic foot per second, provided however that no land shall be served with an amount of water in excess
105 of that beneficially used thereon. In measuring the water so supplied the measure shall be taken for the water supplied to the several canals at the point of diversion from the river.

The Commissioner shall report, from time to time, to the Court as to his action in the premises and shall, whenever he needs the same, apply to the Court for further directions as to his powers and duties to make this decree effective.

Any of the parties to this suit may apply to this Court for any proper modification of this order or in the supervision and direction of the Commissioner.

The compensation of said Commissioner shall be one hundred and fifty dollars and twenty cents ($150.20) per month and shall be paid by the parties hereto in the proportion set out in the following table, to wit:

A table designating the amounts to be paid by the water users under the several canals and ditches, as their pro rata proportion of the salary of the commissioner, based upon the acreage irrigated under each canal:

Canal.	Acres.	Amount.
Brown	100	$ .65
Sanchez	400	2.55
Mejia	320	2.00
Fourness	260	1.65
San Jose	3000	19.00
Michelena	450	2.85
106 Montezuma	3750	23.75
Union	2900	18.35
Sunflower	400	2.55
Graham	962	6.10
Central	2675	16.95

Oregon	1100	6.95
Smithville	1760	11.15
Bryce	515	3.25
Dodge	450	2.85
Nevada	800	5.05
Curtis	800	5.05
Kempton	850	5.40
Reid	100	.65
Ft. Thomas	960	6.10
Thompson	240	1.50
Military	400	2.50
Saline	36	.20
Zeckendorf	500	3.15
Total acres	23,728	Total am't. $150.20

And the said parties shall pay said proportionate sum into the office of the Clerk of this Court for the use of the said Commissioner on the first day of each and every month.

And it is further ordered and decreed that the gates of the water users in arrears of payments to said commissioner in accordance with the foregoing provisions may be kept closed by said Water Commissioner until said arrears are paid and satisfied.

It is further ordered and decreed that in the case of each incorporated company, party hereto, that is operating a canal or ditch the pro rata portion of the said Commissioner's compensation falling due from the acreage of the water users of such canal shall be a charge against the Canal Company and shall be paid by proper officer of such company to the Clerk of this Court on the
107 first day of each month, for the account of said commissioner, and the said officer of the said canal company is hereby authorized to close the gates of water users, under the canal operated by said canal company, who may at any time be in arrears for more than sixty days in the payment of the pro rata share of said commissioner's compensation due from the acreage owned or controlled by said water users, and the said officer is hereby ordered and required to close the gates of the said canal at any time the said canal company may be in arrears of payment, for more than sixty days, to the Clerk of this Court of the pro rata part of the compensation due from the acreage irrigated under the said canal, and to keep such gate closed and the flow of water through said canal arrested until said arrea-ge is paid in full and the commissioner is hereby authorized to superintend such closing of the gate and arrest of flow and to see that the same is done in accordance with provisions of this decree. The parties herein each pay their own cost and the court cost common to all parties necessarily incurred herein is adjudged against all the parties hereto in the same proportion as the salary of the Commissioner has been apportioned herein.

FLETCHER M. DOAN, *Judge.*

Signed and filed this tenth day of February, 1906, as of the 28th day of April, 1905.

GEORGE H. SMALLY, *Clerk.*

108 *Motion for New Trial.*

[Title of Cause.]

Comes now the defendant, Montezuma Canal Company, by its attorneys, Herring & Sorin, and moves the Court to set aside the judgment and decree rendered in said action, and to grant said defendant a new trial in said cause upon the following grounds:

I.

That the Court erred in admitting evidence introduced by plaintiff over defendant's objection;

II.

That the Court erred in rejecting evidence upon the trial of said cause offered by defendant;

III.

That the evidence does not sustain the judgment and decree of the Court in said cause;

IV.

That the judgment and decree is contrary to law:

V.

That the judgment and decree is contrary to the evidence
109 in said cause.

Dated February 10th, 1906.

HERRIN & SORIN,
Attorneys for Defendant Montezuma Canal Company.

[Endorsed:] Filed Feb. 10th, 1906, as of April 28, 1905, as per order entered April 28, 1905. George H. Smalley, Clerk.

Minutes of the Proceedings.

Be it remembered, that heretofore and to-wit, on the 4th day of April, 1904, the same being one of the regular judicial days of the April, 1904, term of said Court, the following order, *inter alia,* was made and entered on record in said Court in Cause No. 1089.

[Title of Cause.]

No. 1089—*Associate Counsel Entered.*

On motion of Mrs. Sarah Sorin, of Counsel, for Defendant Sunflower Canal, it is ordered that C. L. Rawlins, Esq., be and he is hereby entered as associate Counsel for the defendant.

Be it remembered, that heretofore and to-wit: on the 9th day of April 1904, the same being one of the regular judicial days of the April, 1904, term of said Court, the following order *inter alia* was made and entered of record:

110 *Order to Hear Motions and Demurrers.*

[Title of Cause.]

On motion of Counsel, it is ordered that Wednesday, April 20th, 1904, be and is hereby set for hearing and determining all motions, demurrers and other matters to establish the issues in this cause, and it is further ordered that service of process upon all parties to this action be made on or before that date, to-wit: Wednesday, April 20th, 1904.

Be it remembered, that heretofore and to-wit, on the 21st, day of April, 1904, the same being one of the regular judicial days of the April, 1904 term of said Court, the following order *inter alia* was made and entered of record:

Order Making Additional Parties Defendants.

[Title of Cause.]

It is hereby ordered by the Court, on motion of defendants, that all parties, persons and corporations in the Gila Valley, between the Narrows above Solomonville and the line of the San Carlos Indian Reservation at Geronimo, who own or claim irrigable lands, and who use and claim water out of the Gila River, be made parties defendant in this action, and it is further ordered, on motion of Joseph H. Kibbey, Esq., that the word "amended be struck out of the demurrer filed herein in behalf of Frank Dysart, Sixto Garcia
111 and the San Jose Irrigating Company and San Jose Extension Company; the demurrer on behalf of the defendants Montezuma Canal Company and Sunflower Canal Company presented by William Herring, Esq., demurrer in behalf of E. L. Tidwell was presented by C. L. Rawlins, Esq., and demurrer of the San Jose Irrigating Company, and Frank Dysart and Sixto Garcia and San Jose Extension Company, was presented by Joseph H. Kibbey, Esq., and the demurrer of Z. C. Prina *et al*, was presented by C. E. Moorman, Esq. On motion of E. J. Edwards, Esq., it is ordered that the plaintiffs be and are hereby allowed time until 2 o'clock P. M. of this day to present their side of the above named demurrers.

Be it remembered, that heretofore and to-wit, on the same day, the following other order was made and entered:

Order Sustaining Demurrers.

[Title of Cause.]

In this action the demurrers of several of the defendants to plaintiffs' complaint having been presented by Counsel for the respective parties, and submitted to the Court for consideration and decision, and the Court having considered the same and being fully advised in the premises, it is ordered by the Court that said demurrers be and are hereby sustained; and it is further ordered, on motion of E. J. Edwards, Esq., counsel for plaintiffs, that said plaintiffs are
112 hereby allowed thirty days' time from this date in which to file an amended complaint herein, and if not filed within that time, the same may be filed thereafter subject to the penalty of having all costs accrued to this date to be paid by the plaintiffs.

Be it remembered, that heretofore and to-wit, on the 28th, day of April, 1904, the same being one of the regular juridical days of the April, 1904, term of said Court, the following order *inter alia* was made and entered of record:

Extending Time to File Amended Complaint.

[Title of Cause.]

Upon motion of E. J. Edwards, Esq., of counsel for plaintiffs herein it is ordered that the time for filing an amended complaint herein, be and is hereby extended from thirty days, as provided in the order of this Court of the 21 inst, to sixty days, subject, however, to the same conditions contained in the said order of the 21st inst.

113 Be it remembered, that heretofore and to-wit, on the 18th day of October, 1904, the same being one of the regular juridical days of the October, 1904, term of said Court, the following order *inter alia* was made and entered of record:

Order Requiring Answers.

[Title of Cause.]

It is hereby ordered by the Court that all party defendants
114 in this action be and hereby are required to file their answers herein on or before October 25, 1904.

Be it remembered, that heretofore and to-wit, on the same day, the following other order was made and entered:

Order to Pay Water Commissioner.

(Title of Cause.)

It is ordered that all persons, companies and corporations, which are in arrears in their payment of amounts levied against them by and in accordance with a former order of this Court, for the purpose of paying the compensation of the Water Commissioner, pay such dues into Court on or before October 25th, 1904.

Be it remembered, that heretofore and to-wit: on the 9th, day of Feb. 1905, the same being one of the regular juridical days of the October, 1904, term of said Court, the following order *inter alia* was made and entered of record:

Order to Make Shareholders Parties Defendant.

(Title of Cause.)

On motion of Joseph Campbell, Esq., counsel for plaintiffs, it is ordered that the individual shareholders in the following canal companies, defendants herein, as named and set forth in the answers of said defendants, be made parties defendant in the above en-
115 titled action, to-wit. The individual shareholders and users of water in the Oregon Irrigation and Canal Co.; Layton Town Canal Co.; Sunflower Canal Co.; Montezuma Canal Co.; San Jose Irrigating Co.; San Jose Extension Canal Co.; Union Canal and Irrigation Co.; The Kempton Canal Co.; Bryce Irrigation Canal Co.; Curtis Irrigating, Milling and Manufacturing Co.; The Nevada Irrigating and Canal Co.; Military Canal Co.; Ft. Thomas Canal Co.; and Dodge Canal Co. And it is further ordered that the answers filed to the amended complaint herein by the above named corporations defendant, be and they are hereby taken, held and considered as the answers also of the individual shareholders in said above named respective corporations defendant, to the extent that the rights of the said individual shareholders have been therein respectively alleged.

Be it remembered, that heretofore and to-wit, on the same day, the following other order was made and entered:

Default Entered, and Order for Trial.

(Title of Cause.)

On motion of Lee N. Stratton, Esq., of counsel for the Zeckendorf interests in this case, — Lewis, Esq., is hereby entered as associate counsel for said Zeckendorf interests, and it is further ordered that defendant Zeckendorf have leave to file an amended answer
116 herein. On motion of Joseph Campbell, Esq., plaintiffs' counsel, it is ordered that the defendants, the Lee Ditch, the

Mejia Canal Co., the Sanchez Ditch, the Gonzalez Ditch, J. N. Porter as owner of the Porter Ditch, F. M. Hubbard and Robert Pringle as owners of the Collins Ditch, defendants in this action, having been regularly served with process of summons and copy of the complaint in this action, and having failed to appear and answer unto said complaint, and the time allowed by law for answering having expired, the default of said defendants, the Lee Ditch, the Mejia Ditch, the Sanchez Ditch, the Gonzales Ditch, J. N. Porter, as owner of the Porter Ditch or canal, J. N. Porter, F. M. Hubbard, and Robert Pringle as owners of the Collins Ditch, defendants herein, is hereby entered according to law.

It is ordered upon motion and by agreement of the respective counsel present herein, that the demurrers to plaintiffs' complaint be and hereby are considered and taken to be waived except the demurrer of the defendant the Oregon Irrigation Company, which demurrer is hereby overuled.

On motion of Chas. L. Rawlins, Esq., it is ordered that E. L. Tidwell, defendant herein; be and hereby is granted leave to file an amended answer herein, this day, and it is further ordered that this cause be and the same is hereby set for trial on April 3rd, 1905.

117 On motion of William Herring, Esq, of counsel for the Layton Town Canal Co., Chas. L. Rawlins, Esq., is hereby entered as associate Counsel for said Layton Town Canal Company, defendant herein.

On motion of Counsel, it is ordered that the parties to this action pay to the Clerk of this Court, for the salary of Albert T. Colton, the Water Commissioner, the sum of six and one half, (.06½) cents per acre on the land for which they (the parties to this action) claim water for irrigation purposes, from the Gila River, as set forth in the pleadings herein; said amount to be paid each year in quarterly installments, beginning April 1st, 1904, while this action is pending, all amounts now in arrears to be paid within thirty (30) days from this date and hereafter every ninety (90) days; and the Water Commissioner is hereby authorized to withhold the water from any party to this action who hereafter becomes delinquent and is in arrears for more than ninety (90) days in the payment of the assessment hereby levied and authorized, and the Commissioner is hereby authorized to withhold the water from any such party so delinquent until they pay the full amount thus in arrears.

118 Be it Remembered, that heretofore and to-wit, on the same day, the following order was made and entered:

Trial of Cause.

(Title of Cause.)

119 This cause came on regularly for trial before the Court sitting without a jury, a jury trial having been expressly waived by the respective parties, Joseph Campbell, Esq., appearing as counsel for the plaintiffs, and William Herring, Esq.,

appearing for the defendants, the Montezuma Canal Company, and the users of water through said canal; the Layton Town Canal Company and the users of water through said canal, and the Sun Flower Canal Company and the users of water through said canal. Walter Bennett, Esq., appearing as counsel for the defendants the San Jose Irrigating Co. and the users of water through the San Jose Canal, and Frank Dysart and Sixto Garcia, the owners of and users of water through the Michelena Canal; Thomas S. Bunch, Esq., appears as counsel for the Union Canal and Irrigation Company and the users of water through said Union Canal, Bryce Irrigation and Canal Co. and the users of water through Bryce Canal; J. M. McCollum, Esq., appeared as counsel for the Graham Canal Co. and the users of water through said Graham Canal; the Oregon Irrigation and Canal Co. and the users of water through the Oregon Canal; Messrs. Moorman & Stratton appeared as counsel for the "Jones Canal" and the users of water through said Jones Canal; the "Chacon Ditch or Canal," and the users of water through said Chacon Ditch or canal; the "Old San Jose Canal" and the users of water through said San Jose Canal; Z. C. Prina, an owner and user of water through the Sun Flower Canal. C. E. Moorman, Esq.,

120 appeared as counsel for Free Hubbard, an owner and user of water through the Thompson Canal; Wiley Holliday and Marion McEuen, the owners and users of water through the Canal; the Dodge Canal Company and the users of water through the Dodge Canal; the Military Canal Company and the users of water through the Military Canal; the Fort Thomas Canal Co and the users of water through the Fort Thomas Canal. Lee N. Stratton, and E. W. Lewis, Esqrs., appeared as counsel for L. Zeckendorf and Albert Steinfeld, owners and users of water through the Canal. A. G. McAllister Esq., appeared as counsel for John Reed and Thomas H. Bell owners and users of water through the Canal; The Mejia Ditch or canal and the users of water through the Mejia ditch or canal; the Curtis Milling & Manufacturing Co. and the users of water through the Curtis Canal; the Kempton Canal Co. and the users of water through the Kempton Canal. Charles L. Rawlins Esq., appeared as counsel for E. L. Tidwell; owner and user of water through the Brown ditch or canal. Wiley E. Jones, Esq., appeared as counsel for the Nevada Irrigating and Canal Company and the users of water through the Nevada canal.

Upon motion of A. G. McAllister, Esq., and on consent of counsel for the plaintiff in this action; it is ordered that the entry of default against Abeline Mejia, Severe Bartoldo, John Brassea and

121 Henry Bingham, be and the same is hereby set aside.

On motion of Walter Bennett Esq., it is ordered that the firm name of Kibbey, Bennett & Bennett be and the same is hereby substituted for Joseph H. Kibbey, Esq., as counsel for the defendants, the San Jose Irrigating and Canal Company and Frank Dysart and Sixto Garcia, owners of the Michelena Ditch or canal.

Be it remembered, that heretofore and to-wit on the 6th, day of April, 1905, the same being one of the regular juridical days of the April, 1905, term of this Court, the following order *inter alia* was made and entered of record:

Trial of Cause Resumed.

(Title of Cause.)

The trial of this cause is now resumed before the Court, without a jury. The following named witnesses were called, sworn and examined on behalf of the plaintiffs, viz: Albert T. Colton, David Markham, and D. M. Roberts and on motion it is ordered that further hearing herein be continued until 2:30 o'clock P. M. this day.

Be it remembered, that heretofore and to-wit, on the same day, the following other order was made and entered:

Trial of Cause Resumed.

(Title of Cause.)

The trial of this cause is now resumed and the minutes
122 as returned and certified to this court show that the trial proceeded contin-ously by the taking of testimony until April 28, 1905.

A transcript of such minutes being omitted herefrom by stipulation of Counsel as immaterial to this appeal.

See stipulation on file.

Be it remembered, that heretofore and to-wit, on the same day, to-wit, April 28, 1905, the following other order was made and entered.

123 *Trial of Cause Resumed.*

(Title of Cause.)

Come now the parties to this action, and through their counsel, announce ready to proceed herein. Whereupon, the evidence being closed, the cause was argued to the Court by Joseph Campbell, Esq., in behalf of the plaintiffs, and by Charles L. Rawlins, Esq., Lee N. Stratton, Esq., A. G. McAllister, Esq., Thomas S. Bunch, Esq., and E. W. Lewis, Esq., in behalf of the defendants.

By consent of counsel for the respective parties it is
124 ordered that thirty days' time, from this date, be and hereby is allowed counsel for the respective parties to prepare and present to the Court the tabulated statement and brief herein; that this cause is then considered to be submitted to the Court for consideration and decision.

It is further ordered that the judgment when rendered, be entered *nunc pro tunc* as of this date and that the findings of fact and conclusions of law and the decree of this Court herein, be also entered as of this date, and any motions for new trial be considered filed, entered and overruled as of this date; and that exceptions to the ruling of the Court and notices of appeal to the Supreme Court of the Territory of Arizona, be considered taken and given as of this date.

Be it remembered, that heretofore and to-wit, September 23, 1905, the following other order was made and entered in said cause 1089:

In the District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Graham.

SOLOMONVILLE, ARIZ., *Sept. 23rd,* 1905.

Present: Hon. Fletcher M. Doan, Presiding Judge; W. W. Weed, Court Reporter; Frank Dysart, Clerk.

125 *Decision of the Court.*

Smithville Canal Co. *et al. vs.* Oregon Irrigating and Canal Co. *et als.*

Pursuant to an order heretofore made on the 28th day of April, 1905, the Court now announced its decision and findings of fact in the above entitled cause, and it is ordered by the Court that judgment be entered as announced by the Court as is duly set forth in the findings and decree and conclusions of law to be signed by the Court and filed herein; said findings and decree to be filed as of the date heretofore ordered; and it is further ordered by the Court that upon the filing of the decree in the above entitled cause each party have thirty days from the date of said actual filing in which to file objections and exceptions to the findings of law and fact set forth and referred to in said decree and exceptions to said decree and that said objections and exceptions be deemed as overruled by the Court and that thereupon and within ten additional days either party may file a motion for a new trial which shall thereupon be deemed as overruled and said order overruling the same shall be deemed as excepted to and a notice of appeal to the Supreme Court from the said judgment and order overruling said motion for a new trial shall thereupon be deemed as entered of record within the time provided by law.

FLETCHER M. DOAN, *Judge.*

126 Be it remembered, that heretofore and to-wit, on the 17th day of February, 1906, the same being one of the regular juridical days of the January, 1906, term of this Court, the following order was made and entered in this Court, *inter alia,* in said cause No. 1089, which said order is in words and figures as follows, to-wit:

Order Overruling Motion for New Trial; Notice of Appeal.

1089.—Smithville Canal Co. *et al. vs.* Montezuma Canal Co. *et al.*

Upon motion of C. L. Rawlins, Esq., attorney for the Montezuma Canal Company, the Court's attention being directed to stipulations already of record in this case of dates April 28, 1905 and September 23, 1905, pursuant to said stipulations the motion for new trial filed herein by defendants, is denied, to take effect as provided in said stipulation, to which ruling of the Court the defendant excepts; whereupon the said Montezuma Canal Co. gives notice in open Court of its appeal from the judgment and decree rendered herein, and from the order of the Court denying motion for a new trial, to the Supreme Court of the Territory of Arizona, said notice of appeal to take effect as provided in said stipulation.

127 Be it remembered, that heretofore and to-wit, on the 3rd day of March, 1906, the same being one of the regular juridical days of the January, 1906, term of this Court, the following order was made and entered, *inter alia*, in this Court in said cause No. 1089, which said order is in words and figures as follows, to-wit:

Order Granting Further Time to Perfect Record on Appeal.

1089.—Smithville Canal Co. *et al. vs.* Montezuma Canal Co. *et al.*

On motion of Charles L. Rawlins, Esq., it is ordered that the defendant herein be allowed sixty days from this date to file statements of facts, bills of exception, and otherwise perfect its appeal to the Supreme Court of the Territory of Arizona.

Be is remembered, that heretofore and to-wit, on the 30th day of April, 1906, the same being one of the regular juridical days of the January, 1906, term of this Court, the following order was made and entered, *inter alia*, in this Court in said cause No. 1089, which said order is in figures an- words as follows, to-wit:

Order Granting Further Time to Perfect Record on Appeal.

1089.—Smithville Canal Co. *et al. vs.* Montezuma Canal Co. *et al.*

128 On motion of Charles L. Rawlins, Esq., of counsel for the defendants, it is ordered that the defendants herein be and they are hereby granted ninety days from May 3, 1906, to prepare their statement of facts and bill of exceptions, and further perfect their appeal to the Supreme Court of the Territory of Arizona.

(Duly certified by the Clerk under the seal of the Court.)

129 *Notice of Appeal.*

(Title of Court and Cause.)

Charles L. Rawlins, representing Herring & Sorin, counsel for the Montezuma Canal Company, one of the defendants in the above action, and in pursuance of a certain stipulation entered into between counsel for the respective parties in open court, on April 28, 1905, and the further order and stipulation dated September 23rd, 1905, said defendant Montezuma Canal Company gives notice of appeal in open court from the judgment and decree entered herein, and from the order of the court overruling said motion for a new trial, to the Supreme Court of the Territory of Arizona, said notice of appeal to take effect as if made, given and entered in open court as per said stipulation and order dated April 28th and September 23rd, 1905.

HERRING & SORIN,
Attorneys for Defendant.

CHARLES L. RAWLINS,
Attorney, Representing Herring & Sorin.

[Endorsed:] Filed Feb. 17th, 1906. George H. Smalley, Clerk.

130 TERRITORY OF ARIZONA,
County of Graham, ss:

I hereby certify that the annexed and following is a full, true and correct copy of the original Judgment Roll Case No. 505 introduced as evidence by defendant as Ex. 5 in the case entitled Smithville Canal Co. *et al. vs.* Oregon Irrigation and Canal Co. *et al.* now on file in my office.

Witness my hand and affixed Seal this 11th day of July, A. D. 1906.

[SEAL.] GEORGE H. SMALLEY,
Clerk of the District Court of the Fifth Judicial District of the Territory of Arizona in and for Graham County.

131 EXHIBITS OF APPELLANT.

(Trial of Cause.)

This cause came on regularly for trial on the 21 day of April, 1905, same being a regular judicial day of said court, before the court without a jury.

To prove the issue on the part of the Montezuma Canal Company, appellant herein, on April 21, 1905, it offered, *inter alia,* the following evidence.

1. The Judgment Roll in Case Montezuma Canal Company, plaintiff, *vs.* San Jose Irrigating Company, Pedro Michelena, *et al.,* defendants, Case No. 505, marked Exhibit 5 a certified copy of said

Judgment Roll is with the records in case at bar, and is as follows:—

132 Here follows a copy of Decree No. 505 which is contained in that certain Exhibit No. 5, which was filed in this office July 18, 1906.

The other portions of said Exhibit No. 5 having been omitted by direction of the Attorney for the Appellant.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Graham.

MONTEZUMA CANAL COMPANY, a Corporation, Plaintiff,

vs.

SAN JOSE IRRIGATING CO., a Corporation; THE CHIRICAHUA CATTLE CO., a Corporation; Pedro Michelena, Frank Dysart, Ad-
133 ministrator of the Estate of John T. Fitzgerald, deceased; Francisco Montez, Jose Morales, Sixto Molino, Jose Flores, Andres Cerina, Bonito Carrasco, Peter Matherson, Emila Valla, Executor of the Last Will and Testament of Frank Fourness, dec'd; Lorenzo Sanchez, Leonidas Sanchez, Daniel Sanchez, Elicio Sanchez, Abel Sanchez, Luis Baca, Toribio Baca, Jesus Baca, Ricardo Sanchez, John Van Order, Abelino Mejia, Jose Gonzales, Genobio Gonzales and Philip Telles, Defendants.

Decree No. 505.

The above entitled cause came on for trial on the 10th day of February, 1897, before the Court, sitting without a jury, jury having been waived by the respective parties, W. M. Lovell, Esq., appearing on behalf of plaintiff, and C. E. Moorman, Esq., on behalf of the defendant San Jose Irrigating Company, and W. C. McFarland, Esq., on behalf of all of the other defendants, and the respective parties, plaintiff and defendants having produced and introduced testimony in support of their respective rights and claims in controversy in this action, and all of the testimony in evidence having been introduced by and on behalf of said respective parties and said cause having been argued by said respective counsel on the 16th day of February, 1897, and submitted to the Court for its decision, and the Court having fully considered the same, and being
134 now fully advised in the premises and the law, now finds in favor of plaintiff and against all of the above named defendants.

It Is Now Therefore, Ordered, Adjudged And Decreed that said plaintiff, Montezuma Canal Company, a corporation, is the owner of and it and its predecessors have been the owners of and in the possession of, for more than twenty-three years last past, that certain canal known as the Montezuma, situated in the County of Graham and Territory of Arizona, and commencing and beginning at a point in the bed of the Gila River, in Section 17, Township 7 South, Range 27 East, Gila and Salt River Meridian, and running and extending from said point of beginning northwesterly down

said Gila Valley, on the westerly side of said river, through the town of Solomonville, the town of Safford and thence to the northerly termination thereof near the village of Thatcher in the said County of Graham, and through Section 18, Township 7 South, Range 27 East, and Sections 8, 9, 13, 14, 15, 16, 17, 18, 20, 23 and 24, Township 7 South, Range 26 East, and through Sections 2, 3, 11, 12 and 13, Township 7 South, Range 25 East, all on Gila and Salt River Meridian.

That said plaintiff and its predecessors in interest have been for more than 23 years last past entitled to have flowing in said canal continuously, and plaintiff has had and now has the right to
135 and is entitled to have flow in said Montezuma Canal continuously from said Gila River at all times during the dry seasons of the year and when the water is low and scarce in said river, One Thousand miner's inches of water, and has had and is entitled to have flow from said river into said canal 2000 miner's inches of water during the times of wet seasons of the year when the water is high and plentiful therein as against each and all of the defendants herein, and that plaintiff has been and is entitled to the continuous and continuing use of all of said 1000 miner's inches of water, and all of said 2000 miner's inches of water continuously during said dry seasons and said wet seasons of the year respectively for the use and benefit of its respective stock and shareholders for the purpose of irrigating the lands lying along and under said Montezuma Canal, and for domestic and other useful purposes as against each and all of the defendants The San Jose Irrigating Co., The Chiricahua Cattle Co., Pedro Michelena, Frank Dysart, administrator of the estate of John T. Fitzgerald, deceased, Francisco Montes, Jose Morales, Sixto Molino, Jose Flores, Andres Corina, Bonito Carrasco, Peter Matherson, Emila Villa, executor of the last will and testament of Frank Fourness, deceased, Lorenzo Sanchez, Leonidas Sanchez, Daniel Sanchez, Elicio Sanchez, Abel Sanchez, Luis Sanchez, Toribio Baca, Jesus Baca, Ricardo Sanchez, John Van
136 Orden, Abelino Mejia, Jose Gonzales, Cenobio Gonzales and Philip Telles, the owners of those certain irrigating canals and ditches entering and taking water from the channel of said Gila River above the head of Plaintiff's said Montezuma canal and known as the Michelena ditch, San Jose Canal, Fourness, or Old San Jose Ditch, Mejia ditch, Gonzales ditch, Sanchez ditch and Brown ditch, and as against the heirs successors and grantees of each and all of said above named defendants, and all persons claiming or to claim any right, title or interest in or to said ditches and canals above named and owned by said defendants or either of them. It Is Further Ordered, Adjudged and Decreed, That said defendants above named and each and all of them, and their servants, agents, employees, attorneys, and all persons claiming or to claim under them and each of them, and all privies to them and each of them, and all persons acting for them, and each of them, be and they are each and all and every of them hereby perpetually restrained and enjoined from diverting or taking water from said river above the head of plaintiff's said canal during the dry seasons

of the year when the water is low and scarce in said river by means of their said ditches and canals or of any of them or by any other means and from in any manner obstructing the flow of water in said river so as to prevent said water from flowing in the bed of said river and down the same and therefrom into plaintiff's said
137 Montezuma canal to the full extent of 1000 miner's inches during each and every dry season of the year and when the water is low and scarce in said river. And also from in any manner hindering, delaying or preventing said 2000 miner's inches of water from flowing down the channel of or bed of said river and from flowing therefrom in the plaintiff's said canal during the wet seasons of the year and when the water is plentiful in said river.

Done in open Court this 17th day of February, 1897.

OWEN T. ROUSE, *Judge.*

[Endorsed:] Filed Feb. 17th, 1897. Burl B. Adams, Clerk.

Endorsed: 1089. Defendant's Montezuma Canal Co.'s Ex. 5. J. W. W. No. 505. In the District Court Second Judicial District, County of Graham, Territory of Arizona. Montezuma Canal Co. a corp. Plaintiff *vs.* San Jose Irrigating Co., *et al,* Defendant. Judgment roll. Filed Feb. 17, 1907 Burl B. Adams Clerk. Filed at — — M. July 12, 1906 George H. Smalley, Clerk. No. 978. In the Supreme Court, Territory of Arizona. Montezuma Canal Co., a corporation, *vs.* Smithville Canal Co. *et al.* Defts. Ex. "5." Filed July 18, 1906, S. M. Cullom Clerk, By Angie B. Parker Deputy.

138 No. 978.

In the Supreme Court, Territory of Arizona.

MONTEZUMA CANAL CO.
vs.
SMITHVILLE CANAL CO. ET AL.

Reporter's Transcript.

Filed July 18, 1906. S. M. Cullom, Clerk, By Angie B. Parker, Deputy.

The following is an excerpt from the Reporter's Transcript; the remaining portions of said Transcript being omitted by direction of the Attorney for Appellant.

* * * "Col. HERRING: The defendant, the Montezuma Canal Company, now offers in evidence the judgment roll in the case of the Montezuma Canal Company, plaintiff, *vs.* the San Jose Irrigating Co. *et al.* defendants.

Mr. BENNETT: I object to the introduction of the judgment-roll as being irrelevant, immaterial and incompetent, and on the further

ground that the parties to the action in that case were not the
139 same parties as the parties to the action in this case; that the controversy in that case was over a different matter than the controversy in this case.

The ruling being deferred until the evidence in this case is heard, said judgment roll was marked defendant Montezuma Canal Co.'s Exhibit 5." * * *

In the District Court of the Fifth Judicial District of the Territory of Arizona, in and for Graham County.

No. 1089.

SMITHVILLE CANAL COMPANY ET AL., Plaintiff,
vs.
OREGON IRRIGATION AND CANAL COMPANY and MONTEZUMA CANAL COMPANY ET AL., Defendants.

Reporter's Certificate.

I, John W. Walker, Official Court Reporter of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for Graham County, do hereby certify that I was present in said court at the trial of the above entitled cause, on the 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, and 28th days of April 1906; that I took down in shorthand all the questions propounded to the witnesses and their answers thereto during the trial of said cause; that I have transcribed the same, and that the foregoing pages of typewritten matter contain a true and correct copy of all the questions propounded to the witnesses, and their answers thereto, as well also, the remarks, rulings, opinions, and judgments given during the trial thereof by the judge presiding at the trial and that it contains all the oral evidence given at the trial.

Given under my hand this 12 day of July, A. D. 1906.

JOHN W. WALKER,
Official Court Reporter of the District Court of the Fifth Judicial District of the Territory of Arizona in and for Graham County.

139½ All other parts of the Reporter's Transcript and other Exhibits filed in the Court below and sent up to, and filed in this Court in this cause, being omitted herefrom by direction of counsel for appellants as not necessary to the hearing of this appeal.

140 In the Supreme Court of the Territory of Arizona.

No. 978.

MONTEZUMA CANAL COMPANY, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellee.

Appeal from the District Court of Graham County, Before Hon. Fletcher M. Doan, Judge.

Messrs. Thomas Armstrong, Jr., and Charles L. Rollins, for appellant.

Messrs. Walter Bennet and T. S. Bunch, for certain appellees.

Opinion by KENT, *C. J.*:

This is a suit brought by the Smithville Canal Company and a large number of water users under such canal, and the Central Canal Company and the water users under such canal, against all the other canals in the upper Gila valley taking their water from the Gila river, praying that it be adjudged and decreed that the individual plaintiffs, shareholders in said canal companies, be decreed to be the appropriators of a certain amount of the water in said river, and that the defendants be restrained from interfering with such right, and that the defendants be required to set forth what right and claims, if any, they have in and to the water, and that such rights be determined according to the priorities. All the defendant canal companies answered in the case, and the majority of them
141 joined in their answer the individual water users under them. The San Jose Canal Company also filed a cross-bill against the plaintiffs and its codefendants, asking that the rights of the water users under such canal to the water be determined and decreed to be prior to the rights of the other parties to the action. The Montezuma Canal Company, one of the defendants, answered for itself alone, but set up in its answer the individual appropriations claimed by it for the water users under it, and filed an answer to the cross-bill of the San Jose Canal Company; which answer was further in the nature of a cross-bill against the San Jose Canal Company, and in which answer and cross-bill the Montezuma Canal Company made all of its water users plaintiffs, and all of the water users under the San Jose canal defendants; and in addition to setting up the rights of the water users under the Montezuma canal, as against the water users under the San Jose canal, further pleaded a former judgment of the district court of Graham County, which it claimed to be in bar of this action as against the San Jose Canal Company and certain other defendants. Upon the motion of the defendants, the court entered an order making all of the individual shareholders in all the defendant canal companies parties to the action.

The case was tried before the court, without a jury, and a large number of witnesses examined as to the dates of the construction of

the canals referred to, and of the times of the appropriation of water by means of said canals by all of the water users thereunder,
142 and the owners of land irrigable therefrom, the testimony consisting of many hundreds of pages of closely written typewritten matter. The court from the testimony made findings showing the amount of land in cultivation under *such* canal during each year since its inception, and then apportioned the entire supply in the river to the several canals in the order of the priority of the aggregate acreage irrigated under each canal during each year of its existence, the right to appropriate the water by such canals thus being made entirely dependent upon the priority of appropriation by its water users; and prepared an elaborate table of computation, based thereon, and appointed a commissioner to enforce and carry out the decree of the court.

From this judgment the Montezuma Canal Company alone, of all the parties interested, has appealed.

There is no bill of exceptions or statement of facts, and, while the reporter's transcript of evidence has been sent up to this court, it has not been certified by the judge below. The appellant has furnished us an abstract of record, which contains the complaint, the answer of the San Jose Irrigating Company, the answer of Frank Dysart, the answer of the Montezuma Canal Company, the answer and cross-complaint of the San Jose Irrigating Company, the findings and conclusions of law, judgment, motion for a new trial, minute entries, notice of appeal, and what were purported to be certain proceedings in certain former cases in the district court; but the pleadings
143 of the other defendants are omitted, and the testimony is not included.

The first assignment of error is as follows:

"The Court erred in rendering any decree herein affecting the rights of all water-users in the Upper Gila Valley to the use of the water of the Upper Gila River for the reason that the same is not within the issue made by the pleadings in this case."

As the pleadings are not before us, we cannot consider this assignment.

The second assignment of error is as follows:

"The Court erred in attempting by its decree to control the rights of all appropriators and water-users on the Upper Gila River and thereby affecting the rights of this appellant for the reason that none of the appropriators or water-users except as the owners of canals were parties to this action or subject to the jurisdiction of the Court."

Apart from the fact that the state of the record would seem to preclude our determining whether this asignment is well founded, it appears from the minute entries that an order was made by the court, on motion of the defendants, bringing in all individual appropriators and water users of the canal companies, and it does not appear from the record that any question was raised in court below by the appellant as to any non-compliance with this order.

The third assignment of error is as follows:

"The Court erred in *make* any findings or decree granting priori-

ties to the use of the public waters of the Gila River to canals or canal companies not actual beneficial appropriators and users of water for the reason that such rights exist only in the owners and occu-
144 pants of — and to which the water is beneficially applied."

In this contention we think the appellant is at fault in its construction of the findings and decree of the court. The decree does not, nor do the findings, give any priority to the use of the water to any canal or canal companies, nor does the court find or decree that any canal or canal company was an appropriator of water. The court decreed to each of the canal companies the right to divert certain amounts of water, respectively, but as carriers merely, and the right of each canal company so to divert water is made solely dependent upon the rights of water users and appropriators of water who take their water through the heads of the several canals which serve them. While it is true that the court did not decree to each individual the amount of water appropriated by him according to the priority of such appropriation, it did ascertain the dates of the original application of water to the land under the several canals by such water users, and took such dates of appropriation as a basis for ascertaining the amount which each canal might properly divert at all stages of the river for the use of its individual water users. The court found the amount of land in cultivation under each canal during each year since its inception, and then apportioned the entire supply in the river to the several canals in the order of the priority of the aggregate acreage irrigated
145 under each canal during each year of its existence. The decree did not establish rights in water to the canals or canal companies, or priorities as to such canal or canal companies, but in effect decreed to the actual water users under their respective canals the water to which they were entitled by virtue of their several appropriations.

The fourth assignment of error is insufficient under our rules, and does not seem to be argued in the brief of the appellant.

The fifth and sixth assignments of error are based upon the alleged error of the court below in refusing to receive in evidence a judgment in a case numbered 505 in that court, between the Montezuma Canal Company and the San Jose Irrigating Company and certain individual defendants. It is stated in the appellant's abstract that this decree was offered in evidence, and that it was excluded by the court upon objection, but there is no bill of exceptions, and as the reporter's transcript has not been certified as a bill of exceptions, the action of the trial court in that respect can not be reviewed by us.

The other assignments of error are to the effect that the court erred in appointing a water commissioner to carry out the court's decree, the contention of the appellant being that the court
146 has by such appointment of a water commissioner given judicial functions to such officer, and that a delegation of judicial functions to an executive officer of the court is beyond the power of the court.

By its decree the court adjudged that the several parties to the

suit are entitled to receive and divert from the river each for his or their own lands, from time to time, an amount of water and in the order of priority as shown in the tabular statement thereto attached. This statement showed the amount of water which the water users under the canals were entitled to divert for their use at the different stages of water in the river, and showed the accretions to the surface flow at the head of the irrigating system, and gave the approximate amount thereof at the heads of the thirty-one canals. The decree becomes operative as soon as the water in the river is at such a stage that it is insufficient to supply all the canals to their full capacity; and during such times it is obvious that such a decree cannot be self-executing, and that it is essential that an officer of the court be continuously upon the river to regulate the amount to be diverted under the decree by each canal, in accordance with the ever varying volume of water in the river, and according to the tabulated statement. To give effect to such decree, it is necessary that rules
147 and regulations be formulated by such officer, and he must be empowered to make such rules and regulations as are reasonable and necessary to carry out the provisions of the decree. A commissioner so appointed by the court for such purpose is an executive officer of the court; and the power given by the court to such commissioner is an administrative discretion, and not a judicial discretion. It is a proper choice of a method to carry the decree into effect. Paragraph 1431 of the Revised Statutes under the head of "judgments", provides that "the court shall cause its judgment and decree to be carried into execution;" but, apart from such statutory authorization, in the exercise of its common law and chancery jurisdiction, it is within the power of a court of general jurisdiction to provide all necessary means to carry out its judgment and decree. In this case the water commissioner appointed by the court was authorized, in the discharge of his duties, to enter upon all of the canals in question, their dams, gates, flumes, and other structures and appliances, for the purpose of properly distributing and controlling the water to be diverted by such canals under the decree, and was authorized to make such rules and regulations as he should deem proper and expedient to be observed by the parties to the suit for the distribution and use of said water. He was confined in the exercise of his powers in directing the distribution thereof
148 in accordance with the rights of the parties, as to the extent of the land irrigated and order of priority of time of appropriation, as in the decree established. He was directed to report from time to time to the court as to his action; and whenever necessary, to apply to the court for further directions as to his powers and duties to make the decree effective. A compensation for the commissioner was provided to be paid *pro rata* by the parties, based upon the acreage irrigated under each canal. It was further provided that at any time any of the parties to the suit might apply to the court for a proper modification of the order, or in the supervision and direction of the commissioner.

The appointment of such a commissioner to execute the decree of the court was a proper and necessary exercise of the power resting in

the court; and the rights of the parties to the suit to have any improper exercise of the administrative functions of such executive officer corrected by the court upon application, were thus properly safeguarded.

We find no error in the action of the court below, as the record is presented to us; and the judgment of the district court is therefore affirmed.

EDWARD KENT, *C. J.*

We concur:
RICHARD E. SLOAN, *A. J.*
149 JOHN H. CAMPBELL, *A. J.*
FREDERICK S. NAVE, *A. J.*

Endorsed: No. 978. In the Supreme Court of the Territory of Arizona. Montezuma Canal Co. *Vs.* Smithville Canal Co. *et al.* Opinion. Filed March 22, 1907. F. A. Tritle Jr., Clerk.

150 In the Supreme Court of the Territory of Arizona.

No. 987.

MONTEZUMA CANAL COMPANY, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

Motion for Rehearing.

Comes now the appellant, the Montezuma Canal Company by its attorney, and moves the Court for a re-hearing of the above entitled cause, and as grounds therefor specifies:

I.

That this Court, notwithstanding its ruling in regard to certification of reporter's transcript by the judge of the Court below, should have considered such transcript and the evidence therein contained and also the exhibits in the way of written evidence, for the reason that the Statutes of this Territory make such transcript a part of the record in the cause.

II.

That this Court should have considered and passed upon the effect of those certain judgments and decrees known as No. 505 and No. 797, which are expressly recognized as valid decrees and affecting the rights of the parties to this suit by the lower court in its Findings upon which it bases the judgment herein, regardless of the fact
151 whether the record in this cause shows that they were offered and rejected as evidence or not.

III.

That it is manifest from the face of the record that the judgment in this cause is not supported by the Findings, inasmuch as the

Court below expressly recognized the force and effect of the said two prior decrees in No. 505 and No. 797 in its Findings, and refused to give effect to such judgments and decrees in its Judgment in said cause.

Dated at Phœnix, Arizona, March 29th, 1907.

THOS. ARMSTRONG, JR.,

Attorney for the Appellant, Montezuma Canal Company.

Endorsed: No. 978. In the Supreme Court of the Territory of Arizona. Montezuma Canal Company, Appellant, *vs.* Smithville Canal Company *et al.*, Appellees. Motion for Re-hearing. Service of written motion admitted Mch. 29, 1907. Walter Bennett Atty. for San Jose Canal Co. Filed March 29, 1907. F. A. Tritle Jr., Clerk.

152 In the Supreme Court of the Territory of Arizona.

MONTEZUMA CANAL COMPANY, Appellant,

vs.

SMITHVILLE CANAL COMPANY ET AL., Appellees and Respondents.

Affidavit.

TERRITORY OF ARIZONA,
County of Graham, ss:

George A. Olney, being first duly sworn, on oath deposes and says; That he is an officer, to wit the President of the Montezuma Canal Company and Richard Layton a Director of said Company the appellant above named; that he has for many years last past been well acquainted with the property of the appellant, known as the Montezuma Canal, and also with all the other canals and irrigation systems in the Upper Gila Valley, belonging to the several appellees in the above entitled cause; and is now, and has been for many years past, familiar and acquainted with the value of the water carried and delivered by the Montezuma Canal Company through its Montezuma Canal, and of the water carried by and delivered through the canals of the several appellees herein. That the effect of the decree in the above-entitled cause rendered by the District Court of Graham County, and affirmed by the Supreme Court of the Territory of Arizona, has been to deprive the appellant, the Montezuma
153 Canal Company, of the right to take and carry from the Gila River and deliver to the appropriators needing the same under its Montezuma Canal one hundred inches and more of said waters at the lower stages of water in the Gila River, which water the appellant has formerly carried and delivered to appropriators under its Montezuma Canal; that the value of the right to take and carry and deliver such water, exceeds the sum of five thousand ($5,000.) dollars, and by means of and on account of the decree in the above entitled cause depriving the appellant of said water, the value of its property has been depreciated to an extent exceeding five thousand

($5,000.) dollars and the value of other canals owned by appelle-s herein has been increased to more than that amount by reason of said decree.

GEO. A. OLNEY, *President.*
R. G. LAYTON *Director.*

Subscribed and sworn to before me, this 5th., day of June, 1907.
[SEAL.] WILEY E. JONES,
Notary Public.

My commission expires March 8, 1911.

Endorsed: No. 978. In the Supreme Court of the Territory of Arizona. Montezuma Canal Company, Appellant, *vs.* Smithville Canal Company, *et al.* Appelle-s & Respondents. Affidavit. Filed June 18, 1907. F. A. Tritle Jr., Clerk.

154 In the Supreme Court of the Territory of Arizona.

MONTEZUMA CANAL COMPANY, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL, Appellees.

Appeal Bond.

Know all men by these presents: That we, the Montezuma Canal Company, a corporation, as principal, and Henry J. Dowdle and Frank W. Hayes as sureties, are held and firmly bound unto Smithville Canal Company, Lorenzo Cutler, Brigham H. Cluff, David C. Adams, Dorathy E. Smith, Ira Olsen, Charles M. Dwyer, Marie Morales, Edward C. Phillips, Thomas Kimball, Cynthia Layton, A. E. Crawford, William Price, Lorenzo Watson, Nathan P. Warden, John Callen, Janie Bull, W. T. Webb, Henry Lines, Andre W. Carlson, J. A. McBride, W. E. McBride, D. C. Judd, J. W. Allred, George Larson, Martin Martinson, J. G. Bigler, B. F. Whitmer, E. M. Allred, Louise Mattice, Louis Norton, F. W. Moody, Squire Reynolds, W. W. Crockett, Myron Hanchett, C. M. Beals, and James Mallon, co-partners under the firm name of Beals and Mallon; W. W. Damron, S. E. Allen, William Bratton, Thomas Preston, C. D. Haynie, Hyrum Weech, Hannah Boyd, John Saline, P. C. Merrill, Robert Ferrin, S. O. Williams, Joseph Pennsyl, George W. Williams, John Taylor, J. H. Nuttall, Sarah Fuller, W. F. Follett, J. F. Shields, J. H. Beal, S. J. Simms, Central Canal Company; H. Louis, John E., Hiram L., William R., and James B. Norton, co-partners, under the firm name of H. Louis Norton and Brothers; Julia A
155 Daley, George Shirts, Jacob J. Bigler, George A. Bigler, Clarence M. Bigler, Joseph Bigler, J. F. Norton, H. L. Norton, Elizabeth Layton, Samuel Claridge, J. C. Allred, Manuel Palma, Miguel Gonzales, Servera Serrano, Eugene Carruthers, Charles Francis Miles Ray, Daniel Eldridge, William B. Johnson, Ann Pace, Erastus S. Carpenter, Jacob J. McGuire, M. M. Smith, Mary Ann

Carpenter, James M. Moody, Sarah F. Heywood, Joseph M. Heywood, Spence C. Heywood, Ella Heywood, Leland Heywood, David E. Heywood, Sarah V. Heywood, Robert F. Heywood, Irving Y. Heywood, heirs at law of J. N. Heywood, deceased; Edwin Moody, Susan Ann Claridge, Rose Dodge, Hezekiah Stowe, Joseph Cluff, Joseph E. Cluff, William Carpenter, John H. West, Eliza Welker, Frank N. Tyler, Hyrum Brinkerhoff, William K. Cluff, James N. Duke, Christian Madsen, D. W. Cluff, Robert E. Lee, A. S. Porter, W. H. Coombs, Edith Kunz, Manuel Burnel, W. E. Platt, Clarence Woodcock, William Ballard, S. E. Reynolds, Oren Follett, William Follett, J. R. Hamlin, Edward Drew, Elizabeth Craig, W. D. Saline, J. Y. Hendricks, Huldah Mathewson, William Reynolds, W. A. Smith, Isaac Follett, B. W. Cluff, Sr., Jane Cluff, J. A. McBridge Jr., D. C. McBride, Ann Holliday, W. E. Butler, Mary Magnum, D. M. Rogers, Alfred Rohner, W. E. Jones, L. P. Judd, Lucy Kelly, Samuel Lines, J. H. Lines, Jannette Ferrin, Sarah Taylor, Joseph East, William Hundley, Frederick Webb, J. W. Foster, Lu-
156 cinda Gustafson, Lyman Dodge, Milton Lines, W. C. Taylor, H. W. Crockett, S. S. Marshall, N. J. Roseberry, John Mattice, Frank Kirby, Cynthia Rogers, J. S. Beals, H. J. Anderson, F. R. Taylor, William Mallon, Andrew Carlson Jr., Joseph Alder, C. M. Beals, J. D. Boyd, W. B. Ballard, George Ballard, John Cluff, Elizabeth Fuller, Terence O'Bryan, Samuel Williams, Smithville Irrigation and Manufacturing Company, M. W. Ray, Frank Preston, J. D. Haynie, C. M. Birdno, H. L. Norton, J. B. Norton, Isaac Follet, S. E. Collins, Lucinda Merrill, W. A. Smith, Hollis Holiday, Mrs. B. Hawes, Susan Saline, Rebecca Cluff, A. J. Dodge, Charles Keeler, C. R. Norton, Thomas Dodge, Warren Follett, William Ransom, Thomas East, Gerald Merrill, William Whipple, Chirachua Cattle Company, a corporation, Mary Olsen, August Whitmer, Moses A. Cluff, William Price, C. B. Williams,

Oregon Irrigation and Canal Company, I. T. Kempson, K. V. B. Talley, Benjamin Echols, —— Howard and —— Nelms, J. E. Blair, T. S. Kimball, and Orval Larson, Bert Hoopes, A. A. Allred, A. T. West, Free Hubbard, E. F. Hubbard, Mrs. A. Hubbard, Mrs. L. P. Merrill, J. I. Palmer, H. B. Bryce, R. A. Bryce, S. S. Marshal, A. W Chelsey, J. A. Golding, G. W. Lemon, W. Wamsley, Ed Chesley, N. Holyoak, Lyman Hancock, S. F. Murphy, G. O. Peck, J. P. Walker, J. H. Nuttall, G. H. Killian, G. A. Bryce, T. B. Nelson, Frank A. Cluff, H. Stockton, M. Carpenter, D. H. Claridge, J. H. Por-
157 ter, John Felshaw, A. N. Bryce, Simon Matthews,

Layton Town Canal Company, Austin Evans, Jas. T. Owens, Oscar Layton, Eveline Olsen, Arthur Welker, John Welker, Raymond Welker, Adam Welker, Moses Steele, Wm. Ellsworth, Wm. R. Smith, Chas. A. Warner, J. B. Quinn, Wm. Welker, Elam Olsen, Nancy Rollins, Anna Robinson, John Madsen, Jesse Quinn, Jerry Hatch, Geo. W. Quinn, Geo. Foote, Hyrum Fonda, Frank Dysart, Jannette Smithson, Thomas Bell, John West, Adam Welker, Jr., Thomas Richards, Wm. Saulsbury, Geo. Giles, Robt. McAllister, John Clifford, M. P. Snow, W. A. Meyers, John W. Morris, Geo. Quinn, Wm. Morriss, E. T. Ijams, Harriet Crandall,

W. R. Reed, James Corder, A. J. Perkins, Joseph Bingham, Richard Bingham, J. L. Woods, John Lee, Lehi Smithson, Bettie Holladay, Aaron Cheney, Joseph Paulson, J. B. Whitton, Alonza Bingham, Allen Cupp, L. B. Stephens, August Jorgenson, W. Reed, J. N. Keasley, Wm. Posey, J. W. N. Scarlett, L. B. Scarlett, Melvin Montierth, Charles Freestone, A. H. Packer, Richard Layton, David Lee, Richard Bingham, W. H. Clifford, C. R. Freeman, J. L. Freeman, Ernest Ellsworth, Jesse J. Quinn, George H. Killiam, Wm. W. Pace, Aaron E. Cheney, John G. Morris, Lucy B. Guenther, Reuben Fuller,, School Lot, A. E. Turner, Joe Greenhalgh, James Stukey, R. A. Smith, Leonard Freestone, James Freestone, Wm. C. Hoopes, Benjamin Maurer, Wm. J. Packer, Mormon Church Lot, M. M. Chandall, Geo. Olney, Geo. Jacobson, Wm. H. Roach, Christopher Wish, Ira Kempton; Mrs. C. L. Wish, estate of C. L. Wish, Terrance O'Bryan, Maury Grider, Mrs. Emma McGowan, Geo. W. Todd, Austin Evans, Rob't Morris, Z. C. Prina, F. W. Hayes, Wm. Rollins, P. J. Jacobson, Hyrum Bingham, Alice K. Beebe, H. J. Dowdle, Ray Kemp, Paul Beebe, A. J. Perkins, Wm. P.
158 Beebe, N. P. Beebe, Heber Layton, Mrs. Ira Elmer, John Hoopes, C. A. Callison, Thomas S. Merrill, S. P. Crum, Henry Carnes, Martin Echols, H. Layton, Wm. Johns, J. B. Pace, Richard Layton, John Bilby, D. J. Ellsworth, Hal Merrill, Simeon Drollinger, Martin Martensen, Seth Merrill, J. Craig, Sam Echols, Frank Fuller, Cyrus Robinson, W. W. Wild, I. P. Robinson, Frank Robinson, Abraham Bowman, Andrew Kimbal, S. Stinson, Alvin Montierth, Josie Cluff, Robert Tyler, Reuben Bingham, Wm. Posey, Joseph Allred, Alfred A. Barney.

Sunflower Canal Company, Chirachua Cattle Company, Vicente Suarex, Manuel and Francesca Grijalva, J. W. N. Scarlett, Abraham Diaz, Merahildo, Grijalva, Bernardo Telles, Cristine Grijalva, J. D. Hartzler, Blas Ortiz, and Francisca Chavarria, I. E. Solomon, Wm. A. Gillespie, Wm. Gillispi, Geo. A. Olney, Mrs. S. W. Pomeroy, E. L. Tidwell, William Morris, Robert Nash, Joseph Corder, Joseph Dial, W. J. Richards, M. F. Swanger, Augustine Jorquez, Joaquin Padilla, Ramon Guana, Antonio Ruiz, Jr., Evaristo Reos, Thomas Blake, Mathew O'Bryan, Antonio Ruiz, Jessie Quinn, Jno. W. Morris, Pedro Marquis, John Green Francisco Miranda, Lucio Cordero, Geo. D. Briar, Mrs. Emma McGowan, H. S. Palmer, Walter F. Barney, Benjamin Peel, Frank Freestone, Geo. L. Freestone, Benjamin Echols, Henry Dial, Walter Truesdale, G. W. Carness, Harry Clifford, Geo. Bambel, O. C. May, Victoria Garcia, Jas. T. Owens, Oscar Olsen, Eveline Olsen, Arthur Welker, John Welker, Raymond Welker, Adam Welker, Wm. R. Smith, Chas. A. Warner, J. B. Quinn, Wm. Welker, Elam Elsen, Geo. W. Quinn, Hyrum
159 H. Tippets, J. J. Quinn, Joseph Greenhalgh, Jeannette Smithson, Thomas Bell, John West, Adam Walker, Thomas Richards, Wm. Saulsbury, John Clifford, W. A. Meyers, John W. Morris, Wm. Morris, School Lot, A. E. Turner, Joe Greenhalgh, R. A. Smith, Leonard Freestone, Jas. Freestone, Wm. C. Hoopes, Benjamin Maurer, Wm. L. Packer, Mormon Church Lot, M. M. Crandall, Wm. H. Roach, Christopher Wesh, Ira Kempton, Joseph

Bingham, Maury Grider, Geo. W. Todd, J. C. Prina, P. J. Jacobson, Alice Beebe, Paul Beebe, Wm. P. Beebe, N. P. Beebe, W. R. Reed, James Corner, Richard Bingham, J. L. Woods, Bettie Holladay, Joseph Paulson, J. B. Whitton, Allen Cupp, L. B. Stephens, R. L. B. Scarlett, Richard Layton, David Lee, W. H. Clifford, C. R. Freeman, J. L. Freeman, Ernest Ellsworth, John G. Morris, Lucy B. Guenther, Heber Layton, Mrs. Ira Elmer, John Hoopes, C. A. Callison, Thomas F. Merrill, H. Layton, Wm. Johns, J. B. Pace, John Bilby, D. J. Ellsworth, Hal Merrill, Simeon Drollinger, Marten Martensen, Seth Merrill, J. Craig, Sam Echols, I. P. Robinson, Frank Robinson, Andrew Kimball, William Moody, Mrs. Sessions, Mrs. John Hoopes, Andrew J. Kimball, Alvin Montierth.

San Jose Irrigating Company, San Jose Extension Canal Company, B. B. Adams, Jesus Ayres, Alma H. Bennett, W. A. Bennett, Annia Austin, W. T. Barney, A. F. Barney, H. W. Bishop, Alice A. Bishop, F. W. Bishop, Innocent Bartoldi, Jose Bartoldi, A. Curtis, Samuels Curtis, C. and E. Carraco, Fernando Cervantes, Jesus Carasco, Jesus and Petra Carasco, W. F. Clark, B. R. Clark, John Cline, Fred Dysart, Lina M. Dudley, J. C. Epley, George Evans, John
160 Evans, E. J. Edwards, John H. Evans, Angel Franco, Joaquin Figerroa, Amalie Freudenthal, Mrs. Julia McFitzgerald, C. Garcia, Graham County, Gillespie and Freudenthal, Vincent Grecio, Tomas Garcia, Jesus Garcia, Luther Green and estate of N. Green, Luther Green, C. W. Hoopes, T. T. Hunter, Mrs. J. F. Judia, Wiley E. Jones, William Johns, A. A. Johnson, Mary Lacy, Daniel Layman, H. M. Merrill, Morris Martinella, Joe Martin, Montezuma Flour Milling Company, H. S. Mashbir, M. E. Church, south, Alice Merrill, A. Mejia, Avaline Mejia, J. I. Massey, Mrs. O. C. May, Elizabeth M. May, Olver C. May, A. G. McAllister, C. E. Moorman, W. L. Nelson, T. O'Bryan, J. T. Owens, William H. Parks, W. H. Parks, Mrs. Lillian E. Parks, D. B. Ryan and Minnie M. Ryan, Jennie V. Rawlins, Frank Richardson, C. L. Rawlins, Lena Richardson, R. B. Smith, Solomonville Townsite, John See, John S. See, Mrs. Geo. Stevens, Charles F. Solomon, Mitt Simms, School District No. 5, Graham County, M. A. Sothless, Louis Sais, E. M. Simpson, Mrs. Anna Solomon, Felipe Topia, H. C. Ussher, S. L. Ussher, W. A. Wilson, W. R. Waldrop.

Union Canal and Irrigation Company, T. G. Webster, George E. Webster, Frank Webster, Oscar Webster, Reese Webster, William Johns, Eugene Montierth, Peter Andarean, P. Estrado, F. E. Braley, P. J. Jacobson, Fred Thorstensen, H. E. Dunlapp, W. R. Waddill, Thos. S. Merrill, Jr., Benjamin Perkins, M. M. Smith, Elizabeth Pace, A. C. Lamreauz, W. M. Price, R. G. Layton, Isaac Coombs, Jesse Wanslee, Joseph E. Corner, J. N. Perter, M. C. Raylor, School District No. 1, Morrell P. Snow, Wm. D. Johnson, Wiley E.
161 and Phoebe Jones, Nellie A. Sullivan, John Hill, Joseph G. Allred, D. A. Despane, F. W. Moody, Oscar G. Layton, Al Barney, J. O. Pace, Nancy Pace, H. C. Pace, Jesse C. Phillips, Susan Claridge, C. M. Layton, John Shiflets, Frank Tyler, Orlando Jolly, C. C. Curtis, Will Carpenter, Erastus Carpenter, C. N. Nichols, Cyn-

this Layton, C. P. Cole, I. P. Robinson, Mary A. Hoopes, Elizabeth Layton, Frank Layton, Frank Wightman, Charles B. Jones, W. H. Thomas, Dan Kept, James Blazzard, J. M. Moody, Anna Carpenter, W. E. Platt, George Hoopes, Josephine & Emman Cluff, Will Olerton, Dan Eldridge, Hester M. Damron, Charles and Parley McRea, Lillian Claridge, A. C. Peterson, Elizabeth Moody, J. E. Hunt, William Brown, John Hooper, Jr., Robert Hill, Alexander Hunt, John Allen, Leslie Layton, August McRea, S. M. Messinger, H. M. Fugett, Elizabeth Robinson, H. Brinkerhoff, Barbara Layton, L. D. S. Academy, Andrew Woods, D. B. Barney, Will Damron, Robert H. Bears, Lorenzo Cutler, Hyrum Clarson, H. N. Chlarson, J. C. Love, John Daley, Wm. M. Damron, Wilson Lambert, H. L. Johnson, Thomas Naylor, Ed. C. Phillips, David Phillips, Andrew Foley, J. P. Lee, J. N. Heywood, H. L. Gardner, M. M. Smith, Roanna Smith, Eles Rawlins, Susanah Olerton, Andrew Kimball, Emma Porter, Joseph Knudson, Taylor Brown, Sarah J. Lewis, Samuel Curtis, C. N. Chlarson, Samuel Claridge, School District No. —, William Moody, Theodore Moody, A. E. Crawford, Thos. Moody, Walter Rhoads, J. S. Russell, L. G. Moody, Harry W. Layton, Alva S. Porter, Central Ward Church, L. D. S. R. D. Motes, D. Ellsworth, School District No. —, B. F. Whitmer, Tithing Office, L. D. S. at Central, Joseph E. Cluff, R. E. Lee, J. C. Pursley, Lillie Morris, Ella M. Birdno, H. L. Castle, Martin M. Jacobson, Fred B. Jacobson,
Mary E. Madsen, T. E. Rose, Jacob McGuire, Martha Moor-
162 man, James Ellsworth, Geo. D. Brier, Louisa McFarland,
Lucy M. Tuttle, A. E. Jacobson.

The Kempton Canal Company, W. M. Blair, W. H. Colvin, J. C. Colvin, Frank Curtis, F. J. Fuller, John Harper, Owen Hancock, J. A. Hancock, Elijah Hancock, Erastus Hancock, Levi Hancock, Samuel N. Higgins, Heber Higgins, John Holladay, C. R. Jennings, A. B. Kempton, A. J. Kempton, R. A. Kempton, Asa B. Kempton, David Markham, A. F. McEwen, B. E. Norton, W. T. Oliver, I. Palmer, E. Palmer, I. J. Palmer, John H. Pumb, J. S. Tanner, Joseph Thatcher, Lorenzo Thatcher, Fred Webb, Alroy Wilkins.

Bryce Irrigation Canal Company, Phil C. Merril, J. P. Walker, Charles Nelson, John A. Raper, Orson Nelson, Mrs. M. Freestone, H. B. Bryce, A. N. Bryce, W. E. McBride, R. P. Rohner, Mrs. L. P. Merrill, G. A. Bryce, R. A. Bryce, E. P. Bryce, J. W. Bryce, C. E. Norton.

Curtis Irrigating Milling and Manufacturing Company, Wm. Blair, W. R. Carter J., M. M. Curtis, Mary C. Clark, L. M. Colving, Moses Curtis, Malina Curtis, Elizabeth Fuller, Thomas A. Fuller, Francis J. Fuller, Levi Hancock, John H. Holliday, Wiley Holliday, John Harper, Joel Huff, W. W. Hawkins, A. B. Kempton, Bishop, Richard, A. Kempton, David Markham, Ed McEwen, A. Mecham, Emanuel Palmer, Loretta Plumb, D. M. Rogers, John Plumb, Relief Society, H. Stockton, School District No. 11, John Saline, E. W. Thompson, John Tyler, Elroy Wilkins.

163 The Nevada Irrigating and Canal Company, C. B. Boren, E. D. Carter, I. A. Follett, Joseph Foster, Joseph Greenhalgh,

Lehi Larson, Oliva Larson, Eliza Mathews, D. H. Matthews, Peter H. McBride, Louisa Rogers, Charlotte Wilkins, W. A. Carter, Joseph E. Follett, Rhoda Foster, George A. Gourley, L. Hunsaker, James M. Larson, James P. Lindsay, Charles A. Matthews, A. Mecham, Peter A. Norton, John S. Waddill, Frank Wooten.

Military Canal Company, T. K. Werden, Juan Garcia, Oliver Elmer, Anton Christenson, Charles Briner, Chris C. Christensen, George W. Wyatt, Charles N. Rose, W. M. Reay, Abe Winson, J. W. Ballard, George H. Hunter, John Stowe, —— —— and Mrs. S. J. Black.

Fort Thomas Canal Company, George Reynolds, W. A. Bowles, John Wise, W. S. Davis, Joseph York, D. Q. Thurlo, Free Hubbard, G. W. Healey, George F. Hunter, G. W. Wyatt.

Dodge Canal Company, Jennie Bull, M. P. Werden, James Mack, Edd Carter, James Larsen, C. D. Borne, Howard McBride, H. J. Anderson, Francis Kirby, Joseph Foster, Peter McBride, W. A. Carter, Peter Norton, Joseph Greenhalgh, Charles Matthews, Elizabeth Mathews.

Graham Canal Company, P. O. Peterson, George Skinner, D. V. A. Talley, Mrs. J. S. Wilson, R. A. Smith Jr., J. M. Talley, J. T. Talley, W. J. Mullenaux, George Stewart, Eva Messinger, Joseph Blair, John Hancock, Nancy Mattice, J. C. Wanslee, John E. Golding, Moroni Skinner, J. C. Polson, Mrs. C. H. Spafford, I. T. Kempton,
164 Pratt Stewart, William Blard, T. E. Harris, J. A. Allen, Joseph Hunt, John Doe Allred, V. T. Platt, Wm. M. Morris, A. Mullnaux, K. B. V. Talley, Mrs. Alex Stewart, T. S. Kimball, Mrs. Thornton, Lambert, Frank, Butler.

Sanchez Canal, Ricardo Sanchez, Leonidas Sanchez, Daniel Sanchez, Demas de Leon, Toregio Baca, John H. Van Order, Jesus Baca, Lorenzo Sanchez, Abel Sanchez, Santos Serna, Eliseo Sanchez, Jesus Montez, Abelion Mejia, Abran Madrill, Jo Perea.

Mejia Canal, H. Bingham, Rober Bertoldo, Regino Charria, John Brassea.

Fourness Canal, Francisco Montes, Jesus Morales, Emilio Vialla, Sixto Molina, Clara Firness, Aureas Serna, George L. Morris, Victoriano Carrasco, Tomas Perea, Jesus Flores.

R. A. Smith Jr., Jacob Pulsifer, D. B. Williams, W. R. Waddill, Myrtle O. Goodspeed, George C. Brier, George T. McInture, David Angle, E. L. Tidwell, Dimeon De Leon, Dionicio Sanchez, Policarpio Serna, Adiel Sanchez, Juana Sanchez, Amadeo Jajardo, Jesus Vada, Tolivio Vada, Juana Van Order, Abran Madrid, Barando Parra, Samuel Van Order, Ejinio Ortega, Luis Vaca, Harry Van Order, John Van Order, Adeline Van Order, Caroline Serna, Martin Marquex, J. P. Ford, Senovio Gonzales, Cerebero Bertoldo, Rejinio Chavarria, H. Bingham, Francisco Montez, Jesus Morales, Emilio Viala, Sisto Moline, Andres Serna, Sisto Garcia, Pompeyo Jamie, John Reid, Charles Reynolds, Robert Pringle, Freeman M.
165 Hubbard, Louis Zeckendorf and Alfert Steinfeld, co-partners under the firm name of L. Zeckendorf and Company, Appellees and Respondents herein, in the penal sum of one thousand

($1,000.) dollars, to be paid the Smithville Canal Company, *et al.* Appellees and Respondents, their successors, heirs and assigns, for which payment well and truly to be made we bind ourselves and each of us, our successors, heirs, executors, administrators, jointly and severally, firmly by these presents.

The conditions of the above obligations are such, that if the above named appellant, the Montezuma Canal Company, shall prosecute its appeal to the Supreme Court of the United States with effect and if it fail to make its plea good shall answer and pay all costs, then this bond to be void; otherwise to remain in full force and effect.

In witness whereof, we have caused these presents to be executed by the principal and sureties this 5th day of June, A. D. 1907.

MONTEZUMA CANAL COMPANY,
By GEO. OLNEY, *President.*

Attest:
B. F. THUM, *Secretary.*
HENRY J. DOWDLE, *Surety.*
FRANK W. HAYES, *Surety.*

166 TERRITORY OF ARIZONA,
County of Graham, ss:

Henry J. Dowdle and Frank W. Hayes, being first duly sworn, on their oaths depose and say: That they are residents and freeholders within the County of Graham and Territory of Arizona; that each of them is worth the sum of One thousand ($1000.) dollars in property within the Territory of Arizona, over and above his debts, liabilities, and property exempt from execution.

HENRY J. DOWDLE.
F. W. HAYES.

Subscribed and sworn to before me this 5th day of June, A. D. 1907.

[SEAL.] WILEY E. JONES,
Notary Public.

My commission expires March 8, 1911.

TERRITORY OF ARIZONA,
County of Graham, ss:

Before me, Wiley E. Jones, a Notary Public in and for said County and Territory, on this day personally appeared Henry J. Dowdle and Frank W. Hayes known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 5th day of
167 June, 1907.

[SEAL.] WILEY E. JONES,
Notary Public.

My commission expires March 8, 1911.

TERRITORY OF ARIZONA,
County of Graham, ss:

Before me, Wiley E. Jones, a Notary Public in and for said County of Graham, Territory of Arizona, on this day personally appeared George A. Olney, the President and Ben F. Thumb, the Secretary of the Montezuma Canal Company, a corporation, the grantor named in the foregoing instrument, and known to me to be the persons whose names as such officers, are subscribed to the foregoing instrument, and as such officers, to wit, the President and Secretary of said corporation, acknowledged the execution of said instrument as the free act and deed of such corporation by each of them voluntarily executed for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 5th day of June, A. D. 1907.

[SEAL.] WILEY E. JONES,
Notary Public.

My commission expires March 8, 1911.

Endorsed: No. 978. Supreme Court, Territory of Arizona. Montezuma Canal Company, Appellant, *vs.* Smithville Canal Company *et al.*, Appellees & Respondents. Bond on Appeal to Supreme Court of the United States. Approved both as to form & sufficiency
168 June 18, 1907. Filed June 18, 1907. F. A. Tritle, Jr., Clerk.

169 In the Supreme Court of the Territory of Arizona.

MONTEZUMA CANAL COMPANY, Appellant,

vs.

SMITHVILLE CANAL COMPANY ET AL., Appellees & Respondents.

Comes now the appellant, the Montezuma Canal Company, by Thomas Armstrong, Jr., its attorney, and conceiving it is aggrieved by the order entered in the above-entitled action by this Court on the 22nd day of March, 1907, and having heretofore in open Court given notice of appeal therefrom to the Supreme Court of the United States, and having now filed its affidavit of Value, showing that more than five thousand dollars is involved and in dispute herein, exclusive of costs, and having also filed its Bond on Appeal to the Supreme Court of the United States herein, which Bond has been duly approved, doth hereby appeal from said Order of this Court to the Supreme Court of the United States, and prays that this appeal be allowed, and that the transcript of the record, proceedings and papers on which said Order was made, duly authenticated, may be sent to the Supreme Court of the United States.

THOS. ARMSTRONG, JR.,
Attorney for Appellant.

170 And now, to-wit on June 18th, 1907, in open Court, it is ordered that the appeal as prayed for above be allowed as prayed for.

Done in open Court this 18th day of June, 1907, by the Court.

EDWARD KENT,
Chief Justice.

Endorsed: No. 978. In the Supreme Court of the Territory of Arizona. Montezuma Canal Company, Appellant, *vs.* Smithville Canal Company *et al.* Appellees & Respondents. Appeal to U. S. S. C. and allowance of same. Filed June 18, 1907. F. A. Tritle Jr., Clerk.

171 In the Supreme Court of the United States.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

Assignments of Errors.

Comes now the appellant in the above entitled cause and makes the following assignments of errors alleged to have been committed by the Supreme Court of the Territory of Arizona, and upon which it will rely in its appeal from the final judgment of said Supreme Court of the Territory of Arizona rendered on the 22nd day of March, 1907:

Assignment of Error No. 1.

The Court erred in affirming the judgment of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Graham, wherein the said District Court decreed to other canals and canal companies taking water from the Gila river above the head of the appellant's canal, to-wit, the Brown, Sanchez, Mejia, Fourness, San Jose and Michelena any water until this appellant had received 1,000 inches in times of low water and 2,000 in times of plentiful water in the head of its canal, for the reason that the same was not within the issues of the cause and had been theretofore by decree of the said District Court plead and offered in evidence therein, settled, and such canals enjoined from
172 so taking water and said decree was then in full force and virtue.

Assignment of Error No. 2.

The Court erred in affirming the decree of the District Court aforesaid whereby the Brown, Sanchez, Mejia, Fourness, San Jose and Michelena canals taking water from the Gila river above the head of Appellant's canal are decreed as entitled to receive from the Gila river any water before this appellant shall have received into the head

of its canal 1,000 inches in times of low water and 2,000 inches in times of plentiful water, for the reason that the right of this appellant to receive such water in preference to said other canals had been theretofore by decree of the said District Court, expressly recognized by said District Court in its findings of fact, settled, and such canals enjoined from so taking water, but which decree the said District Court, notwithstanding its findings, ignored entirely in its judgment now affirmed by the Supreme Court of Arizona.

Assignment of Error No. 3.

The Supreme Court of the Territory of Arizona erred in affirming the judgment of the District Court of Graham county aforesaid, for the reason that the findings upon which said judgment is based do not support the judgment rendered by the said District Court, and, in fact, said judgment is expressly contrary to said findings in this, that said findings expressly recognized the force and effect of the prior judgment of the same court in Cause 505 judging this appellant
entitled to 1,000 inches of water at all low stages of the river
173 and 2,000 inches at high stages as against the San Jose Canal Company, the Michelena, Brown, Sanchez, Mejia and Fourness canals, all taking water above the head of this appellant's canal, and enjoining said canals and their owners from taking any water from the river until this appellant had received its 1,000 inches so adjudged to it by said prior judgment; whereas the judgment based on such findings deprives this appellant of the benefit of such findings and former judgment and expressly gives such other canals, and more especially the San Jose Canal Company's canal, large quantities of water before the canal of this appellant receives its 1,000 inches so adjudged to it.

Assignment of Error No. 4.

The Court erred in affirming the decree of the District Court of Graham County appointing a so-called commissioner to execute the decree in this case, for the reason that such appointment is not within the issues of this cause or within the powers of the court, or justified, or required by law, or the pleadings or proceedings herein.

Assignment of Error No. 5.

The Supreme Court of Arizona erred in affirming the judgment of the District Court of Graham county delegating to one Albert T. Colton judicial powers to settle and determine the rights of the parties hereto.

Assignment of Error No. 6.

The Supreme Court of the Territory of Arizona erred in
174 affirming the judgment of the District Court of Graham County wherein said court gave to one Albert T. Colton super-

vision and control of the waters of the Gila river rightfully belonging to this appellant, for carriage and distribution and requiring this appellant to pay to the said Colton fees, salary and compensation.

Assignment of Error No. 7.

The Supreme Court of Arizona erred in refusing to consider the action of the court below as to the alleged rejection of the offer in evidence of the judgment roll in the case of the Montezuma Canal Company *vs.* San Jose Canal Company, *et al.*, No. 505, and in refusing to consider such former judgment upon this appeal notwithstanding it had been duly certified and became part of the record on appeal to the Supreme Court of Arizona by the express terms of the statutes of the Territory, although not strictly in compliance with the rules of the Supreme Court of Arizona.

For all of which this appellant prays a reversal of the judgment of the Supreme Court of the Territory of Arizona.

THOS. ARMSTRONG, JR.,
Attorney for the Appellant, Montezuma Canal Company.

Endorsed: No. 978. In the Supreme Court of the United States. Montezuma Canal Company, a corporation, Appellant, *vs.* Smithville Canal Company, *et al.*, Appellees. Assignments of Errors.
175 Filed July 8, 1907. F. A. Tritle Jr., Clerk, by Angie B. Parker, Deputy.

176 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 12th day of November A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

On motion of Mr. Thos. Armstrong, Jr., attorney for Appellant herein, it is ordered that Appellant have until December, 1906, in which to file brief.

And afterwards and upon to-wit the 15th day of January A. D. 1907, the same being one of the regular juridical days of the January Term A. D., 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

177 No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

On motion of Mr. Chas. L. Rawlins, attorney for Appellant herein, it is ordered that this cause be set for January 17th, 1907, on oral argument.

And afterwards and upon to-wit the 17th day of January A. D., 1907, the same being one of the regular juridical days of the January Term A. D., 1907, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

This cause coming on this day for hearing, was argued by Mr. Chas. L. Rawlins and Mr. Thos. Armstrong, Jr., for Appellant, and Mr. Walter Bennett for Appellees, and cause ordered submitted.

178 And afterwards and upon to-wit the 22nd day of March A. D., 1907, the same being one of the regular juridical days of the January Term A. D., 1907, of said Court, the following order *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

This cause having been heretofore submitted, and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the Appellees herein, Smithville Canal Company, Lorenzo Cutler, Brigham H. Cluff, David C. Adams, Dorathy E. Smith, Ira Olsen, Charles M. Dyer, Marie Morales, Edward C. Phillips, Thomas Kimball, Cynthia Layton, A. E. Crawford, William Price, Lorenzo Watson, Nathan P. Warden, John Callen, Janie Bull, W. T. Webb, Henry Lines, Andrew Carlson, J. A. McBride, W. E. McBride, D. C. Judd, J. W.
179 Allred, George Larson, Martin Martinson, J. G. Bigler, B. F. Whitmer, E. M. Allred, Louis Mattice; Louis Norton, F. W. Moody, Squire Reynolds, W. W. Crockett, Myron Hanchett, C. M.

Beals, and James Mallon, co-partners under the firm name of Beals & Mallon; W. W. Damron, S. E. Allen, William Bratton, Thomas Preston, C. D. Haynie, Hyrum Weech, Hannah Boyd, John Saline, P. C. Merrill, Robert Ferrin, S. O. Williams, Joseph Pennsyl, George W. Williams, John Taylor, J. H. Nuttall, Sarah Fuller, W. F. Follett, J. F. Shields, J. H. Beal, S. J. Simms, Central Canal Company, H. Louis, John E., Hiram L., William R., and James B. Norton, co-partners under the firm name of H. Louis Norton and Brothers; Julia A. Daley, George Shirts, Jacob J. Bigler, George A. Bigler, Clarence M. Bigler, Joseph Bigler, J. F. Norton, H. L. Norton, Elizabeth Layton, Samuel Claridge, J. G. Allred, Manuel Palma, Miguel Gonzales, Servera Serrano, Eugene Carruthers, Charles Francis, Miles Ray, Daniel Eldridge, William B. Johnson, Ann Pace, Erastus S. Carpenter, Jacob J. McGuire, M. M. Smith, Mary Ann Carpenter, James M. Moody, Sarah F. Heywood, Joseph M. Heywood, Spence C. Heywood, Ella Heywood, Leland Heywood, David E. Heywood, Sarah V. Heywood, Robert F. Heywood, Irving Y. Heywood, heir at law of J. N. Heywood, deceased; Edwin Moody, Susan Ann
180 Claridge, Rose Dodge, Hezekiah Stowe, Joseph Cluff, Joseph E. Cluff, William Carpenter, John H. West, Eliza Welker, Frank N. Tyler, Hyrum Brinkerhoff, William K. Cluff, James N. Duke, Christian Madsen, D. W. Cluff, Robert E. Lee, A. S. Porter, W. H. Coombs, Edith Kunz, Manuel Burnel, W. E. Platt, Clarence Woodcock, William Ballard, S. E. Reynolds, Oren Follett, William Follett, J. R. Hamlin, Edward Drew, Elizabeth Craig, W. D. Saline, J. Y. Hendricks, Huldah Mathewson, William Reynolds, W. A. Smith, Isaac Follett, D. W. Cludd, Sr., Jane Cluff, J. A. McBride, Jr., D. C. McBride, Ann Holliday, W. P. Butler, Mary Magnum, D. M. Rogers, Alfred Rohner, W. E. Jones, L. P. Judd, Lucy Kelly, Samuel Lines, J. H. Lines, Janette Ferrin, Sarah Taylor, Joseph East, William Hundley, Frederick Webb, J. W. Foster, Lucinda Gustafson, Lyman Dodge, Miltin Lines, W. C. Taylor, H. W. Crockett, S. S. Marshall, N. J. Roseberry, John Mattice, Frank Kirby, Cynthia Rogers, J. S. Beals, H. J. Anderson, F. R. Taylor, William Mallon, Andrew Carlson, Jr., Joseph Alder, C. M. Beals, J. D. Boyd, W. B. Ballard, George Ballard, John Cluff, Elizabeth Fuller, Terence O'Bryan, Samuel Williams, Smithville Irrigation and Manufacturing Company, M. W. Ray, Frank Preston, J. D. Haynie, C. M. Birdno, H. L. Norton, J. B. Norton, Isaac Follett, S. E. Collins, Lu-
181 cinda Merrill, W. A. Smith, Hollis Holliday, Mrs. B. Hawes, Susan Saline, Rebecca Cluff, A. J. Dodge, Charles Keeler, C. R. Norton, Thomas Dodge, Warren Follett, William Ransom, Thomas East, Gerald Merrill, William Whipple, Chirachua Cattle Company, a corporation, Mary Olsen, Angus Whitmer, Moses A. Cluff, William Price, C. B. Williams, Oregon Irrigation and Canal Company, I. T. Kempton, K. V. B. Talley, Benjamin Echols, —— Howard and —— Nelms, J. E. Blair, T. S. Kimball and Orval Larson, Bert Hoopes, A. A. Allred, A. T. West, Free Hubbard, E. F. Hubbard, Mrs. A. Hubbard, Mrs. L. P. Merrill, J. I. Palmer, H. B. Bryce, R. A. Bryce, S. S. Marshall, A. W. Chelsey, J. A. Golding, G. W. Lemon, W. Wamsley, Ed. Chelsey, N. Holyoak, Lyman Han-

cock, S. F. Murphy, G. O. Peck, J. P. Walker, J. H. Nuttall, G. H. Killian, G. A. Bryce, T. B. Nelson, Frank A. Cluff, H. Stockton, M. Carpenter, D. H. Claridge, J. H. Porter, John Felshaw, A. N. Bryce, Simon Mathews, Layton Town Canal Company, Austin Evans, Jas. T. Owens, Oscar Layton, Eveline Olsen, Arthur Welker, John Welker, Raymond Welker, Adam Welker, Moses Steele, Wm. Ellsworth, Wm. R. Smith, Chas. A. Warner, J. B. Quinn, Wm. Welker, Elam Olsen, Nancy Rollins, Anna Robinson, John Madsen, Jesse Quinn, Jerry Hatch, Geo. W. Quinn, Geo. Foote, Hyrum H.

182 Tippets, J. P. Welker, J. J. Quinn, Joseph Greenhalgh, Robt. Peel, W. B. Fonda, Frank Dysart, Janette Smithson, Thomas Bell, John West, Adam Welker, Jr., Thomas Richards, Wm. Saulsbury, Geo. Giles, Robt. McAllister, John Clifford, M. P. Snow, W. A. Meyers, John W. Morris, Geo. Quinn, Wm. Morris, E. T. Ijams, Harriet Crandall, W. R. Reed, James Corder, A. J. Perkins, Joseph Bingham, Richard Bingham, J. L. Woods, John Lee, Lehi Smithson, Bettie Holladay, Aaron Cheney, Joseph Paulson, J. B. Whitton, Alonza Bingham, Allen Cupp, L. B. Stephens, August Jorgernson, W. Reed, J. N. Keasley, Wm. Posey, J. W. N. Scarlett, L. B. Scarlett, Melvin Montierth, Charles Freestone, A. H. Packer, Richard Layton, David Lee, Richard Bingham, W. H. Clifford, C. R. Freeman, J. L. Freeman, Ernest Ellsworth, Jesse J. Quinn, George H. Killian, Wm. W. Pace, Aaron E. Cheney, John G. Morris, Lucy B. Guenther, Reuben Fuller, School Lot, A. E. Turner, Joe Greenhalgh James Stukey, R. A. Smith, Leonard Freestone, James Freestone, Wm. C. Hoopes, Benjamin Maurer, Wm. J. Packer, Mormon Church Lot, M. M. Crandall, Geo. Olney, Geo. Jacobson, Wm. H. Roach, Christopher Wish, Ira Kempton; Mrs. C. L. Wish, estate of C. L. Wish, Terrance O'Bryan, Maury Grider, Mrs. Emma McGowan, Geo. W. Todd, Austin Evans, Robt. Morris, Z. C. Prima, F. W. Hayes, Wm. Rollins, P. J. Jacobson, Hyrum Bingham, Alice K. Beebe, H. J.

183 Dowdle, Ray Kemp, Paul Beebe, A. J. Perkins, Wm. P. Beebe, N. P. Beebe, Heber Layton, Mrs. Ira Elmer, John Hoopes, C. A. Callison, Thomas S. Merrill, S. P. Crum, Henry Carnes, Martin Echols, H. Layton, Wm. Johns, J. B. Pace, Richard Layton, John Bilby, D. J. Ellsworth, Hal Merrill, Simeon Drollinger, Martin Martensen, Seth Merrill, J. Craig, Sam Echols, Frank Fuller, Cyrus Robinson, W. W. Wild, I. P. Robinson, Frank Robinson, Abraham Bowman, Andrew Kimball, Wm. Moody, Mrs. —— Sessions, Mrs. John Hoopes, Andrew Kimball, S. Stinson, Alvin Montierth, Josie Cluff, Robert Tyler, Reuben Bingham, Wm. Posey, Joseph Allred, Alfred A. Barney,

Sunflower Canal Company, Chirachua Cattle Company, Vicente Suarez, Manual and Francisca Grijalva, J. W. N. Scarlett, Abraham Diaz, Merahildo Grijalva, Bernardo Telles, Christine Grijalva, J. D. Hartzler, Blas Ortiz, and Francisca Chavarria, I. E. Solomon, Wm. A. Gillespie, Wm. Gillispi, Geo. A. Olney, Mrs. S. W. Pomeroy, E. L. Tidwell, William Morris, Robert Nash, Joseph Corder, Joseph Dial, W. J. Richards, M. F. Swanger, Augustine Jorquez, Joaquin Padilla, Ramon Guana, Antonio Ruiz, Jr., Evaristo Reos, Thomas Blake, Mathew O'Bryan, Antonio Ruiz, Jessie Quinn, Jno. W. Mor-

ris, Pedro Marquis, John Green, Francisco Miranda, Lucio Cordero,
Geo. D. Briar, Mrs. Emma McGowan, H. S. Palmer, Walter
184 F. Barney, Benjamin Peel, Frank Freestone, Geo. L. Freestone, Benjamin Echols, Henry Dial, Walter Truesdale, G. W. Carness, Harry Clifford, Geo. Gambel, O. C. May, Victoria Garcia, Jas. T. Owens, Oscar Olsen, Eveline Olsen, Arthur Welker, John Welker, Raymond Welker, Adam Welker, Wm. R. Smith, Chas. A. Warner, J. B. Quinn, Wm. Welker, Elam Olsen, Geo. W. Quinn, Hyrum H. Tippets, J. J. Quinn, Joseph Greenhalgh, Janette Smithson, Thomas Bell, T. John West, Adam Welker, Thomas Richards, Wm. Saulsbury, John Clifford, W. A. Meyers, John W. Morris, Wm. Morris, School Lot, A. E. Turner, Joe Greenhalgh, R. A. Smith, Leonard Freestone, Jas. Freestone, Wm. C. Hoopes, Benjamin Maurer, Wm. J. Packer, Mormon Church Lot, M. M. Crandall, Wm. H. Roach, Christopher Wesh, Ira Kempton, Maury Grider, Geo. W. Todd, J. C. Prina, P. J. Jacobson, Alice Beebe, Joseph Bingham, Paul Beebe, Wm. P. Beebe, N. P. Beebe, W. R. Reed, James Corder, Richard Bingham, J. L. Woods, Bettie Holladay Joseph Paulson, J. B. Whitton, Allen Cupp, L. B. Stephens, R. L. B. Scarlett, Richard Layton, David Lee, W. H. Clifford, C. R. Freeman, J. L. Freeman, Ernest Ellsworth, John G. Morris, Lucy B. Guenther, Heber Layton, Mrs. Ira Elmer, John Hoopes, C. A.
Callison, Thomas F. Merrill, H. Layton, Wm. Johns, J. B.
185 Pace, John Bilby, D. J. Ellsworth, Hal Merrill, Simeon Drollinger, Marten Martensen, Seth Merrill, J. Craig, Sam Echols, I. P. Robinson, Frank Robinson, Andrew Kimball, William Moody, Mrs. Sessions, Mrs. John Hoopes, Andrew J. Kimball, Alvin Montierth,

San Jose Irrigating Company, San Jose Extension Canal Company, B. B. Adams, Jesus Ayres, Alma H. Bennett, W. A. Bennett, Annia Austin, W. T. Barney, A. F. Barney, H. W. Bishop, Alice A. Bishop, F. W. Bishop, Innocent Bartoldi, José Bartoldi, A. Curtis, Samuel Curtis, C. and E. Carraco, Fernando Cervantes, Jesus Carasco, Jesus and Petra Carasco, W. F. Clark, B. R. Clark, John Cline, Fred Dysart, Lina M. Dudley, J. C. Epley, George Evans, John Evans, E. J. Edwards, John H. Evans, Angel Franco, Joaquin Figerroa, Amalie Freudenthal, Mrs. Julia M. G. Fitzgerald, C. Garcia, Graham County, Gillespie and Freudenthal, Vicent Grecio, Tomas Garcia, Jesus Garcia, Luther Green and estate of N. Green, Luther Green, C. W. Hoopes, T. T. Hunter, Mrs. J. F. Judia, Wiley E. Jones, William Johns, A. A. Johnson, Mary Lacy, Daniel Layman, H. M. Merrill, Morris Martinella, Joe Martin, Montezuma Flour Milling Company, H. S. Mashbir, M. E. Church South, Alice
Merrill, A. Mejia, Avaline Mejia, J. I. Massey, Mrs. O. C. May,
186 Elizabeth M. May, Oliver C. May, A. G. McAllister, C. E. Moorman, W. L. Nelson, T. O'Bryan, J. T. Owens, William H. Parks, W. H. Parks, Mrs. Lillian E. Parks, D. B. Ryan, and Minnie M. Ryan, Jennie V. Rawlins, Frank Richardson, C. L. Rawlins, Lena Richardson, R. B. Smith, Solomonville Townsite, John See, John S. See, Mrs. Geo. Stevens, Charles F. Solomon, Mitt Simms, School District No. 5 Graham County, M. A. Sothless, Louis

Sais, E. M. Simpson, Mrs. Anna Solomon, Felipe Topia, H. C. Ussher, S. L. Ussher, W. A. Wilson, W. R. Waldrop,

Union Canal and Irrigation Company, T. G. Webster, George E. Webster, Frank Webster, Oscar Webster, Reese Webster, William Johns, Eugene Montierth, Peter Andarsan, P. Estrado, F. E. Braley, P. J. Jacobson, Fred Thorstensen, H. E. Dunlapp, W. R. Waddill, Thos. S. Merrill, Jr., Benjamin Perkins, M. M. Smith, Elizabeth Pace, A. O. Lamreauz, W. M. Price, R. G. Layton, Isaac Combs, Jesse Wanslee, Joseph E. Corder, J. N. Porter, M. C. Taylor, School District No. 1, Morrell P. Snow, Wm. D. Johnson, Wiley E. and Phoebe Jones, Nellie A. Sullivan, John Hill, Joseph G. Allred, D. A. Despane, F. W. Moody, Oscar G. Layton, Al Barney, J. O. Pace, Nancy Pace, H. C. Pace, Jesse C. Phillips, Susan Claridge, C. M. Layton, John Shitlets, Frank Tyler, Orlando Jolly, C. G. Curtis,

187 Will Carpenter, Erastus Carpenter, C. N. Nichols, Cynthis Layton, D. P. Cole, I. P. Robinson, Mary A. Hoopes, Elizabeth Layton, Frank Layton, Frank Wightman, Charles B. Jones, W. H. Thomas, Dan Kemp, James Blazzard, J. M. Moody, Anna Carpenter, W. E. Platt, George Hoopes, Josephine and Emman Cluff, Will Olerton, Dan Eldridge, Hester M. Damron, Charles and Farley McRea, Lillian Claridge, A. C. Peterson, Elizabeth Moody, J. E. Hunt, William Brown, John Hoopes, Jr., Robert Hill, Alexander Hunt, John Allen, Leslie Layton, August McRea, S. M. Messinger, H. M. Fugett, Elizabeth Robinson, H. Brinkerhoff, Barbara Layton, L. D. S. Academy, Andrew Woods, D. B. Barney, Will Damron, Robert H. Bears, Lorenzo Cutler, Hyrum Clarson, H. N. Chlarson, J. D. Love, John Daley, Wm. M. Damron, Wilson Lambert, H. L. Johnson, Thomas Naylor, Ed. C. Phillips, David Phillips, Andrew Foley, J. P. Lee, J. N. Heywood, H. L. Gardner, M. M. Smith, Roanna Smith, Eles Rawlins, Susanah Olerton, Andrew Kimball, Emma Porter, Joseph Knudson, Taylor Brown, Sarah J. Lewis, Samuel Curtis, C. N. Chlarson, Samuel Claridge, School District No. —, William Moody, Theodore Moody, A. E. Crawford, Thos. Moody, Walter Rhoads, J. S. Russell, L. G. Moody, Harry W. Layton, Alva S. Porter, Central Ward Church, L. D. S., R. D. Motes,

188 D. Ellsworth, School District No. —, B. F. Whitmer, Tithing Office, L. D. S., at Central, Joseph E. Cluff, R. E. Lee, J. C. Pursley, Lillie Morris, Ella M. Birdno, H. L. Castle, Martin M. Jacobson, Fred B. Jacobson, Mary E. Madsen, T. E. Rose, Jacob McGuire, Marthe Moorman, James Ellsworth, Geo. D. Brier, Louisa McFarland, Lucy M. Tuttle, A. E. Jacobson.

The Kempton Canal Company, W. M. Blair, W. H. Colvin, J. D. Colvin, Frank Curtis, F. J. Fuller, John Harper, Owen Hancock, J. A. Hancock, Elijah Hancock, Erastus Hancock, Levi Hancock, Samuel N. Higgins, Heber Higgins, John Holladay, C. R. Jennings, A. B. Kempton, A. J. Kempton, R. A. Kempton, Asa B. Kempton, David Markham, A. F. McEwen, B. E. Norton, W. T. Oliver, I. Palmer, E. Palmer, I. J. Palmer, John H. Plumb, J. S. Tanner, Joseph Thatcher, Lorenzo Thatcher, Fred Webb, Alroy Wilkins.

Bryce Irrigation Canal Company, Phil C. Merril, J. P. Walker,

Charles Nelson, John A. Raper, Orson Nelson, Mrs. M. Freestone, H. B. Bryce, A. N. Bryce, W. E. McBride, R. P. Rohner, Mrs. L. P. Merrill, G. A. Bryce, R. A. Bryce, E. P. Bryce, J. W. Bryce, C. E. Norton.

Curtis Irrigating Milling and Manufacturing Company, Wm. Blair, W. R. Carter, Jr., M. M. Curtis, Mary C. Clark, L. M. Colvin, Moses Curtis, Malina Curtis, Elizabeth Fuller, Thomas A. Fuller, Francis J. Fuller, Levi Hancock, John H. Holliday, Wiley
189 Holliday, John Harper, Joel Huff, W. W. Hawkins, A. B. Kempton, Bishop, Richard A. Kempton, David Markham, Ed. McEuen, A. Mecham, Emanuel Palmer, Loretta Plumb, D. M. Rogers, John Plumb, Relief Society, H. Stockton, School District No. 11, John Saline, E. W. Thompson, John Tyler, Elroy Wilkins.

The Nevada Irrigating and Canal Company, C. B. Boren, E. L. Carter, I. A. Follett, Joseph Foster, Joseph Greenhalgh, Lehi Larson, Oliva Larson, Eliza Mathews, D. H. Matthews, Peter H. McBride, Louisa Rogers, Charlotte Wilkins, W. A. Carter, Joseph E. Follett, Rhoda Foster, George A. Gourley, L. Hunsaker, James M. Larson, James P. Lindsey, Charles A. Matthews, A. Mecham, Peter A. Norton, John S. Waddill, Frank Wooten,

Military Canal Company, T. K. Werden, Juan Garcia, Oliver Elmer, Anton Christensen, Charles Briner, Chris. C. Christensen, George W. Wyatt, Charles N. Rose, W. M. Reay, Abe Winson, J. W. Ballard, George F. Hunter, John Stowe, — and Mrs. S. J. Black,

Fort Thomas Canal Company, George Reynolds, W. A. Bowles, John Wise, W. S. Davis, Joseph York, D. Q. Thurlo, Free Hubbard, G. W. Healy, George F. Hunter, G. W. Wyatt,

Dodge Canal Company, Jennie Bull, M. P. Werden, James
190 Mack, Edd. Carter, James Larsen, C. D. Borne, Howard McBride, H. J. Anderson, Francis Kirby, Joseph Foster, Peter McBride, W. A. Carter, Peter Norton, Joseph Greenhalgh, Charles Matthews, Elizabeth Mathets,

Graham Canal Company, P. O. Peterson, George Skinner, D. V. A. Talley, Mrs. J. S. Wilson, R. A. Smith, Jr., J. M. Talley, J. T. Talley, W. J. Mulenaux, George Stewart, Eva Messinger, Joseph Blair, John Hancock, Nancy Mattice, J. C. Wanslee, John E. Golding, Moroni Skinner, J. C. Polson, Mrs. C. H. Spafford, I. T. Kempton, Pratt Stewart, William Blard, T. E. Harris, J. A. Allen, Joseph Hunt, John Doe Allred, V. T. Platt, Wm. M. Morris, A. Mullenaux, K. B. V. Talley, Mrs. Alex. Stewart, T. S. Kimball, Mrs. Thornton, Lambert, Frank Butler,

Sanchez Canal, Ricardo Sanchez, Leonidas Sanchez, Daniel Sanchez, Demas de Leon, Torebio Baca, John H. Van Order, Jesus Baca, Lorenzo Sanchez, Abel Sanchez, Santos Serna, Eliseo Sanchez, Jesus Montes, Abelion Mejia, Abran Madrill, Jo Perea,

Mejia Canal, H. Bingham, Rober Bertoldo, Regino Charria, John Brassea,

Fourness Canal, Francisco Montes, Jesus Morales, Emilio Vialla, Sixto Molina, Clara Fourness, Aureas Serna, George L.
191 Morris, Victoriano Carrasco, Tomas Perea, Jesus Flores, R. A. Smith, Jr., Jacob Pulsifer, D. B. Williams, W. R.

Waddill, Myrtle, O. Goodspeed, George D. Brier, George T. McIntyre, David Angel, E. L. Tidwell, Dimeon De Leon, Dionidio Sanchez, Policarpio Serna, Adiel Sanchez, Juana Sanchez, Amadeo Jajardo, Jesus Vaca, Tolivio Vaca, Juana Van Order, Abran Madrid, Banardo Parra, Samuel Van Order, Ejinio Ortega, Luis Vaca, Harry Van Order, John Van Order, Adelina Van Order, Carolina Serna, Martin Marquez, J. P. Ford, Senovio Gonzales, Cerbero Bertoldo, Rejinio Chavarria, H. Bingham, Francisco Montez, Jesus Morales, Emilio Viala, Sisto Molino, Andres Serna, Sisto Garcia, Pompeyo Jamie, John Reid, Charles Reynolds, Robert Pringle, Freeman M. Hubbard; Louis Zeckendorf and Albert Steinfeld, co-partners under the firm name of L. Zeckendorf and Company, do have and recover of and from the Montezuma Canal Company, a corporation, Appellant herein, and M. F. Swanger and I. E. Solomon, sureties on Appeal Bond herein, their costs in this court, taxed at thirty four and 60/100 ($34.60) dollars, and their costs in the court below in this cause incurred.

192 And afterwards and upon to-wit the 23rd day of May, A. D. 1907, the same being one of the regular juridical days of the January Term A. D. 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

It is ordered that the Motion for Re-hearing filed herein by Appellant, be submitted.

And afterwards and upon to-wit the 24th day of May, A. D. 1907, the same being one of the regular juridical days of the January Term A. D. 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellee.

193 It is ordered that the Motion for Re-hearing filed herein by Appellant and heretofore submitted, be and the same is hereby, denied.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

At this day comes Thos. Armstrong, Jr., Esq., for Appellant herein, in open court and gives notice of appeal from the judgment of this court, to the Supreme Court of the United States.

Upon motion of Thos. Armstrong, Jr., Esq., for Appellant, it is ordered that the amount of the Bond on Appeal be fixed in the sum of one thousand ($1,000) dollars.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

194 No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

At this day, upon motion of attorney for Appellant herein, it is ordered that he be granted time in which to file Affidavit of Value.

And afterwards and upon to-wit the 18th day of June A. D. 1907, the same being one of the regular juridical days of the January Term A. D. 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 978.

MONTEZUMA CANAL COMPANY, a Corporation, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

At this day comes Thomas Armstrong, Jr., Esq., attorney for Appellant herein, in open court, and files his Affidavit of Value showing that the amount involved exceeds the sum of five thousand dollars,

It is thereupon ordered that the appeal of said Montezuma Canal Company be, and the same is hereby, allowed.

195 In the Supreme Court of the Territory of Arizona.

MONTEZUMA CANAL COMPANY, Appellant,
vs.
SMITHVILLE CANAL COMPANY ET AL., Appellees.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled action, that the Clerk of the Supreme Court of the Territory of Arizona may, in making up the transcript of the appeal to the Supreme Court of the United States, omit therefrom the following portions of the record, as not being necessary to the determination of such appeal, to-wit:

1. The names and descriptions of property owned by the several plaintiffs, commencing at the words "H. Louis Norton" at folio 60 of the printed Abstract of the Record, and from thence to the end of folio 103 of the said Abstract.

2. The names and descriptions of land owned by the plaintiffs, commencing with the words "Lorenzo Cutler" in folio 119 of the printed Abstract of the Record, and continuing from thence to the end of folio 143 of said Abstract.

3. The names and descriptions of land owned by the defendants, commencing with the words "that the said defendants" in
196 folio 180 of the printed Abstract of the Record, and running from thence to and including the figures "R. 26 E." at folio 270 of said printed Abstract, and may insert in lieu of said last omission these words: "Here follows separate statements as to the holdings of each of said defendants joining in this answer in the same language as the last paragraph, excepting only as to the varying descriptions of the holdings."

4. Commencing at the words "in the S. ½ of N. E. ¼" at folio 314 of the printed Abstract of the Record, and continuing thence to the character "IV" at folio 339 of said Abstract, and insert in lieu thereof: "Here follows description of the land of each of these answering defendants in the same language as last above, excepting only the varying descriptions of their several lands."

5. Commencing at the character "II" at folio 357 of the printed Abstract of the record, and from thence to the character "IV" at folio 383 of said Abstract, and insert in lieu thereof: "Here follows the names of each of said defendants so answering, with the description of the lands held by him."

6. The table of figures appearing at folios 481 and 482 of the printed Abstract of the Record, being the first table of figures
197 at the top of page 161 of the printed Abstract of the Record.

Dated — ——, —.

THOS. ARMSTRONG, JR.,
Attorney for Appellant.
WALTER BENNETT,
Attorney for Appellees.

(Endorsed:) No. 978. In the Supreme Court of the Territory of Arizona. Montezuma Canal Company, Appellant *vs.* Smithville Canal Company, *et al.*, Appellees. Stipulation. Filed Sept. 23, 1907. F. A. Tritle, Jr., Clerk.

198 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 197, inclusive, contain a true copy of the record, opinion of the Court, and of the assignments of errors, and of all proceedings in the case of Montezuma Canal Company, Appellant, *vs.* Smithville Canal Company *et al.*, Appellees, lately heard and decided in our Supreme Court of the Territory of Arizona, as the same remain on file and of record in my office, excepting only such parts thereof as have been omitted herefrom by stipulation of counsel for the parties and by direction of the Appellant's attorney as not necessary on the hearing of this appeal, and each such omission appears in this transcript with the true reason for such omission stated.

In witness whereof, I have hereunto set my hand and the seal of the said Supreme Court of the Territory of Arizona, at Phœnix, this 26" day of September, A. D. 1907.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.

Endorsed on cover: File No. 20,924. Arizona Territory supreme court. Term No. 217. Montezuma Canal Company, appellant, *vs.* Smithville Canal Company *et al.* Filed December 7th, 1907. File No. 20,924.

Office Supreme Court, U. S.
FILED.
MAR 26 1909
JAMES H. McKENNEY,
CLERK.

BRIEF FOR THE APPELLANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted] 1

MONTEZUMA CANAL COMPANY, APPELLANT,

vs.

SMITHVILLE CANAL COMPANY, ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

JOHN J. HAWKINS,
Attorney for Appellant.

FILED
MAR 26 1909

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 217.

MONTEZUMA CANAL COMPANY, APPELLANT,

VS.

SMITHVILLE CANAL COMPANY, ET AL, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of Graham County, settling certain rights to the use of the waters of the Gila River for irrigation purposes.

To give the Court an idea of the importance of this controversy and of the rights involved, it may be well to state briefly some of the uncontroverted facts, as they appear from the record herein.

The lands involved in this controversy comprise about 24,000 acres. They lie in a long, narrow strip, mostly on the South side of the upper Gila River, in Graham County, near the Eastern boundary of the Territory of Arizona. All these lands are naturally arid and desert, and incapable of producing any crops whatsoever without the artificial application of water thereon.

The Gila River is the source of supply for their irrigation, and from time to time since 1873, many canals, most of them of small capacity, have been taken out from that river and by means thereof these 24,000 acres of land have been brought into cultivation, supporting a large farming population and several considerable villages. These lands, with water, are among the most productive and valuable in the Territory. Without water, their orchards, vineyards and alfalfa fields would, in a year's time, return to the desert and be of no value whatsoever. Hence the vital interest the parties have in this controversy and the large pecuniary value of their rights to the use of the water of the river.

This action was commenced in the District Court of Graham County by the Smithville Canal Company and its shareholders, and by the Central Canal Company and its shareholders, as plaintiffs, against this appellant, the Montezuma Canal Company, and several other canal companies and individual owners of irrigating canals in the upper Gila Valley; the plaintiffs' shareholders alleging that they were the owners and occupants of lands in such valley which they had cultivated by means of water taken from the Gila River since 1876 and 1873, respectively, and that 1500 inches of water, miner's measurement, had been so taken into each of said Canal Company's canals and used by these shareholders for the irrigation of their lands; that subsequent to their so taking and using such water, this appellant, the Montezuma Canal Company, and the other canal companies and individual defendants named, had entered upon the banks of the Gila River, above the head of the plaintiff's canals, and taken out water, which had been diverted and carried away to the irrigation of lands not entitled thereto, but subsequent in time of cultivation and irrigation to the plaintiffs' lands, and had thereby wrongfully deprived the plaintiffs of the water to which they were entitled by prior appropriation and use; that great injury was thereby done and threatened to be done to the plaintiffs; and the plaintiffs prayed a decree establishing their prior right to have flow into each of their canals 1500 inches from the Gila River, and that the defendants be enjoined from diverting any water from the said river above the canals of the plaintiffs.

This appellant filed its answer denying the prior rights of the plaintiffs to the use of the water of the river, and alleging that it was the owner of the Montezuma Canal, which had been constructed prior to the year 1873; that it had ever since taken out and conveyed, by means of such canal, 2,000 inches of water of the river for the use, and which was then and had been continuously used for the irrigation and cultivation of land owned and occupied by persons who had appropriated for that purpose all of such 2,000 inches; that such appropriation and taking and conveying of such water was prior in time and right to that of the plaintiffs; and that such water was then all required for the cultivation of the lands of its shareholders, a list of whom, with the descriptions of their land holdings, was attached to this answer. This answer also set up that as against the San Jose Canal Company, the Michelena Canal Company and its owners, Dysart and Garcia, and E. L. Tidwell, certain others of the defendants in said action, the question of priority of rights to the use of the waters of the Gila River had been determined by a decree of the Court in which this action was pending, rendered on the 17th day of February, 1897, wherein it was decreed that as against all such defendants, this appellant was entitled to have flow to, and to take and carry in its canal, 1,000 inches of water in dry seasons, when water was low and scarce, and 2,000 inches in wet seasons, when water was plentiful in said river. This answer also set up ten years' adverse use of such water and plead the bar of the statute of limitations thereto.

This appellant, the Montezuma Canal Company, also filed with its answer a cross bill, setting up the judgment of the District Court of Graham County in the action theretofore tried, and specified in its answer, wherein it had been decreed, as against the San Jose Canal Company, the Michelena Canal and its owners, Dysart and Garcia, E. L. Tidwell, and others, now defendants in this action, 1,000 inches of water in dry seasons and 2,000 inches in wet seasons, and specifically pleaded such decree by date of its rendition, on February 17th, 1897.

The San Jose Canal Company and Frank Dysart, et al, owning the Michelena Canal, answered, claiming prior rights

in time to the plaintiffs and to this appellant, and prayed that their rights to the water from the Gila River for irrigation be declared prior in time and right to those of all the other parties hereto, both plaintiff and defendant. (See Fol. 44, page 21 Transcript).

By an order of the trial court made in the progress of the cause, all water users and canal companies taking water from the upper Gila River were made parties to the action, and virtually all canals and water users of that valley were brought in and their rights set up in the cause, and the cause proceeded to what was apparently assumed by the Court and by the parties as an adjudication of the rights of all water users on the upper Gila River to the use of the waters of that stream for irrigation. This sufficiently appears from the orders made in the progress of the trial, from the vastly increased number of persons named as parties to the final decree, and also from the facts as stated by the Supreme Court of Arizona in its opinion to be found at Fol. 143, page 69, of the Transcript herein.

Not all the pleadings filed in this cause, and but a small portion of the testimony adduced at the trial are incorporated in the transcript brought to this Court, and it is not intended by the appellant to request a review by this Court of any more than the two questions which were most strongly urged upon the Supreme Court of Arizona, and the decision of which most vitally affects the rights of this appellant, namely:

1. The deprivation of this appellant of the right to take from the Gila River and carry in its canal to its water users, 1,000 inches of water in dry seasons, and 2,000 inches of water in wet seasons, as against the San Jose, Michelena, and other canals and canal companies and individuals who were parties to the former action in which such waters were decreed to this appellant.

2. The appointment by the Court of a so called water commissioner to sieze and control the waters in question and distribute them among the parties to this decree by and in accordance with rules which he might adopt, as provided for in the decree.

ASSIGNMENTS OF ERRORS.

"Comes now the appellant in the above entitled cause and makes the following assignments of errors alleged to have been committed by the Supreme Court of the Territory of Arizona, and upon which it will rely in its appeal from the final judgment of said Supreme Court of the Territory of Arizona rendered on the 22nd day of March, 1907:

ASSIGNMENT OF ERROR NO. 1.

The Court erred in affirming the judgment of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Graham, wherein the said District Court decreed to other canals and canal companies taking water from the Gila river above the head of appellant's canal, to-wit, the Brown, Sanchez, Mejia, Fourness, San Jose and Michelena any water until this appellant had received 1,000 inches in times of low water and 2,000 in times of plentiful water in the head of its canal, for the reason that the same was not within the issues of the cause and had been theretofore by decree of the said District Court plead and offered in evidence therein, settled, and such canals enjoined from so taking water and said decree was then in full force and virtue."

The decree referred to in this assignment and the record of the offer of the same in evidence is as follows:

To prove the issue on the part of the Montezuma Canal Company, appellant herein, on April 21, 1905, it offered, inter alia, the following evidence.

"1. The Judgment Roll in case Montezuma Canal Company, plaintiff, vs. San Jose Irrigating Company, Pedro Micheelna, et al., defendants. Case No. 505, marked Exhibit 5 a certified copy of said Judgment Roll is with the records in case at bar, and is as follows:

"Here follows a copy of Decree No. 505 which is contained in that certain Exhibit No. 5, which was filed in this office July 18, 1906.

The other portions of said Exhibit No. 5 having been omitted by direction of the Attorney for the Appellant.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Graham.

Montezuma Canal Company, a Corporation, Pla*intiff*,

vs.

San Jose Irrigating Co., a Corporation; The Chiricahua Cattle Co., a Corporation; Pedro Michelena, Frank Dysart, Administrator of the Estate of John T. Fitzgerald, deceased; Francisco Montez, Jose Morales, Sixto Molino, Jose Flores, Andres Cerina, Bonito Carrasco, Peter Matherson, Emila Valla, Executor of the Last Will and Testament of Frank Fourness, dec'd; Lorenzo Sanchez, Leonidas Sanchez, Daniel Sanchez, Elicio Sanchez, Abel Sanchez, Luis Baca, Toribio Baca, Jesus Baca, Ricardo Sanchez, John Van Order, Abelino Mejia, Jose Gonzales and Philip Telles, Defendants.

DECREE NO. 505.

The above entitled cause came on for trial on the 10th day of February, 1897, before the Court, sitting without a jury, jury having been waived by the respective parties, W. M. Lovell, Esq., appearing on behalf of plaintiff, and C. E. Moorman, Esq., on behalf of the defendant San Jose Irrigating Company, and W. C. McFarland, Esq., on behalf of all the other defendants, and the respective parties, plaintiff and defendants having produced and introduced testimony in support of their respective rights and claims in controversy in this action, and all of the testimony in evidence having been introduced by and on behalf of said respective parties and said cause having been argued by said respective counsel on the 16th day of February, 1897, and submitted to the Court for its decision, and the Court having fully considered the same, and being now fully advised in the premises and the law, now finds in favor of plaintiff and against all of the above named defendants.

It Is Now Therefore, Ordered, Adjudged and Decreed that said plaintiff, Montezuma Canal Company, a Corporation, is the owner of and it and its predeces-

sors have been the owners of and in the possession of, for more than twenty-three years last past, that certain canal known as the Montezuma, situated in the County of Graham and Territory of Arizona, and commencing and beginning at a point in the bed of the Gila River, in Section 17, Township 7 South, Range 27 East, Gila and Salt River Meridian, and running and extending from said point of beginning northwesterly down said Gila Valley, on the Westerly side of said river, through the town of Solomonville, the town of Safford and thence to the northerly termination thereof near the village of Thatcher in the said County of Graham, and through Section 18, Township 7 South, Range 27 East, and Sections 8, 9, 13, 14, 15, 16, 17, 18, 20, 23 and 24, Township 7 South, Range 26 East, and through Sections 2, 3, 11, 12 and 13, Township 7 South, Range 25 East, all on Gila and Salt River Meridian.

That said plaintiff and its predecessors in interest have been for more than 23 years last past entitled to have flowing in said canal continuously, and plaintiff has had and now has the right to and is entitled to have flow in said Montezuma Canal continuously from said Gila River at all times during the dry seasons of the year and when the water is low and scarce in said river, One Thousand miner's inches of water, and has had and is entitled to have flow from said river into said canal 2000 miner's inches of water during the times of wet seasons of the year when the water is high and plentiful therein as against each and all of the defendants herein, and that plaintiff has been and is entitled to the continuous and continuing use of all of said 1000 inches of water, and all of said 2000 inches of water continuously during said dry seasons and said wet seasons of the year respectively for the use and benefit of its respective stock and shareholders for the purpose of irrigating the lands lying along and under said Montezuma Canal, and for domestic and other useful purposes as against each and all of the defendants The San Jose Irrigating Co., The Chiricahua Cattle Co., Pedro Michelena, Frank Dysart, administrator of the estate of John T. Fitzgerald, deceased, Francisco Montes, Jose Morales, Sixto Molino, Jose

Flores, Andres Corina, Bonito Carrasco, Peter Matherson, Emila Villa, executor of the last will and testament of Frank Fourness, deceased, Lorenzo Sanchez, Leonidas Sanchez, Daniel Sanchez, Elicio Sanchez, Abel Sanchez, Luis Sanchez, Toribio Baca, Jesus Baca, Ricardo Sanchez, John Van Orden, Abelino Mejia, Jose Gonzales, Cenobio Gonzales and Philip Telles, the owners of those certain irrigating canals and ditches entering and taking water from the channel of said Gila River above the head of Plaintiff's said Montezuma canal and known as the Michelena ditch, San Jose Canal, Fourness, or Old San Jose Ditch, Mejia ditch, Gonzales ditch and Brown ditch, and as against the heirs successors and grantees of each and all of said above named defendants, and all persons claiming or to claim any right, title or interest in or to said ditches and canals above named and owned by said defendants or either of them. It is Further Ordered, Adjudged and Decreed, That said defendants above named and each and all of them, and their servants, agents, employees, attorneys, and all persons claiming or to claim under them and each of them, and all privies to them and each of them, and all persons acting for them, and each of them, be and they are each and all and every of them hereby perpetually restrained and enjoined from diverting or taking water from said river above the head of plaintiff's said canal during the dry seasons of the year when water is low and scarce in said river by means of their said ditches and canals or of any of them or by any other means and from in any manner obstructing the flow of water in said river so as to prevent said water from flowing in the bed of said river and down the same and therefrom into plaintiff's said Montezuma Canal to the full extent of 1000 miner's inches during each and every dry season of the year and when the water is low and scarce in said river. And also from in any manner hindering, delaying or preventing said 2000 miner's inches of water from flowing down the channel of or bed of said river and from flowing therefrom in the plaintiff's said canal during the wet seasons of the year and when the water is plentiful in said river.

Done in open Court this 17th day of February, 1897.

OWEN T. ROUSE, Judge.

(Endorsed:) Filed Feb. 17th, 1897. Burl B. Adams, Clerk.

Endorsed: 1089. Defendant's Montezuma Canal Co.'s Ex. 5. J. W. W. No. 505. In the District Court Second Judicial District, County of Graham, Territory of Arizona. Montezuma Canal Co. a corp. Plaintiff vs. San Jose Irrigating Co., et al, Defendant. Judgment Roll. Filed Feb. 17, 1967, Burl B. Adams, Clerk. Filed at .....M. July 12, 1906 George H. Smalley, Clerk. No. 978. In the Supreme Court, Territory of Arizona. Montezuma Canal Co., a corporation, vs. Smithville Canal Co., et al, Defts. Ex. "5." Filed July 18, 1906, S. M. Cullom, Clerk, By Angie B. Parker, Deputy.

No. 978.

In the Supreme Court, Territory of Arizona.

MONTEZUMA CANAL CO.

vs.

SMITHVILLE CANAL CO., ET AL.

Reporter's Transcript.

Filed July 18, 1906, S. M. Cullom, Clerk, By Angie B. Parker, Deputy.

The following is an excerpt from the Reporter's Transcript; the remaining portions of said transcript being omitted by direction of the Attorney for the Appellant.

* * * * COL. HERRING: The defendant, the Montezuma Canal Company, now offers in evidence the judgment roll in the case of the Montezuma Canal Company, plaintiff, vs. the San Jose Irrigating Co. et al, defendants.

MR. BENNETT: I object to the introduction of the judgment roll as being irrelevant, immaterial and incompetent, and on the further ground that the parties

to the action in that case were not the same parties as the parties to the action in this case; that the controversy in that case was over a different matter than the controversy in this case.

The ruling being deferred until the evidence in this case is heard, said judgment roll was marked defendant Montezuma Canal Co.'s Exhibit 5." * * * *)

ASSIGNMENT OF ERROR NO. 2.

"The Court erred in affirming the decree of the District Court aforesaid whereby the Brown, Sanchez, Mejia, Fourness, San Jose and Michelena canals are decreed as entitled to receive from the Gila River any water before this appellant shall have received into the head of its canal 1,000 inches in times of low water and 2,000 inches in times of plentiful water, for the reason that the right of this appellant to receive such water in preference to said other canals had been theretofore by decree of the said District Court, expressly recognized by said District Court in its findings of fact, settled, and such canals enjoined from so taking water, but which decree the said District Court, notwithstanding its findings, ignored entirely in its judgment now affirmed by the Supreme Court of Arizona."

(The findings of the District Court herein referred to is to be found on page 40 of the Transcript, and is as follows:

XI.

"On the 17th day of February, 1897, a decree was entered in this Court in action No. 505 wherein the Montezuma Canal Company was plaintiff, The San Jose Irrigating Company, a corporation, Chiricahua Cattle Company, a corporation, Pedro Michelena and others were defendants, wherein it was adjudged and decreed that the plaintiff had the right and was entitled to have flow into the Montezuma Canal continuously from the Gila River at all times during the dry season of the year when water is low and scarce in said river, 1000 miner's inches of water, and was entitled to have flow from the said river into said canal 2000 miner's inches of water at times of wet seasons of the year

when water is high and plentiful therein, as against each and all of the defendants in said action, and in which it was ordered, adjudged and decreed that said defendants above named, and all persons claiming under them and each of them be perpetually restrained and enjoined from diverting or taking water from the said river above the head of plaintiff's said canal, or or in any manner obstructing the flow of water in the said river, so as to prevent the said water from flowing in the bed of said river down the same, and therefrom into plaintiff's canal to the full extent of a thousand inches during each and every dry season of the year when water is low and scarce, and also from in any manner preventing the said 2000 miner's inches of water from flowing down the channel or bed of said river, and from flowing therefrom into plaintiff's said canal during the wet seasons of the year when water is plentiful in said river.")

ASSIGNMENT OF ERROR NO. 3.

"The Supreme Court of the Territory of Arizona erred in affirming the judgment of the District Court of Graham County aforesaid, for the reason that the findings upon which said judgment is based do not support the judgment rendered by the said District Court, and, in fact, said judgment is expressly contrary to said findings in this, that said findings expressly recognize the force and effect of the prior judgment of the same court in Cause 505 judging this appellant entitled to 1,000 inches of water at all low stages of the river and 2,000 inches at high stages as against the San Jose Canal Company, the Michelena, Brown, Sanchez, Mejia and Fourness canals, all taking water above the head of this appellant's canal, and enjoining said canals and their owners from taking any water from the river until this appellant has received its 1,000 inches so adjudged to it by said prior judgment; whereas the judgment based on such findings deprives this appellant of the benefit of such findings and former judgment and expressly gives such other canals, and more especially the San Jose Canal Company's canal, large quantities of water before the canal of this appellant receives its 1,000 inches so adjudged to it.

ASSIGNMENT OF ERROR NO. 4.

The Court erred in affirming the decree of the District Court of Graham County appointing a so-called commissioner to execute the decree in this case, for the reason that such appointment is not within the issues of this cause or within the powers of the court, or justified, or required by law, or the pleadings or proceedings herein.

ASSIGNMENT OF ERROR NO. 5.

The Supreme Court of Arizona erred in affirming the judgment of the District Court of Graham County wherein said court gave to one Albert T. Colton supervision and control of the waters of the Gila River rightfully belonging to this appellant, for carriage and distribution and requiring this appellant to pay to the said Colton fees, salary and compensation.

ASSIGNMENT OF ERROR NO. 7.

The Supreme Court of Arizona erred in refusing to consider the action of the court below as to the alleged rejection of the offer in evidence of the judgment roll in the case of the Montezuma Canal Company vs. San Jose Canal Company, et al., No. 505, and in refusing to consider such former judgment upon this appeal notwithstanding it had been duly certified and became part of the record on appeal to the Supreme Court of Arizona by the express terms of the statutes of the Territory, although not strictly in compliance with the rules of the Supreme Court of Arizona.

For all of which this appellant prays a reversal of the judgment of the Supreme Court of the Territory of Arizona."

ARGUMENT.

I.

The questions to be determined in this Court are therefore comparatively simple and no extended or elaborate statement is necessary in their presentation.

The appellant's assignments of error Nos. 1, 2 and 3 concern the first question, and a repetition of the second assignment is probably all that is necessary to call this Court's attention clearly to this matter.

ASSIGNMENT OF ERROR NO. 2.

"The Court erred in affirming the decree of the District Court aforesaid whereby the Brown, Sanchez, Mejia, Fourness, San Jose and Michelena Canals taking water from the Gila River above the head of Appellant's canal are decreed as entitled to receive from the Gila River any water before this appellant shall have received into the head of its canal 1,000 inches in times of low water and 2,000 inches in times of plentiful water, for the reason that the right of this appellant to receive such water in preference to said other canals had been theretofore by decree of the said District Court, expressly recognized by said District Court in its findings of fact, settled, and such canals enjoined from so taking water, but which decree the said District Court, notwithstanding its findings, ignored entirely in its judgment now affirmed by the Supreme Court of Arizona." (Transcript, Fol. 172, page 82.)

In support of its plea of a former adjudication of the rights of this appellant as against the owners of the Brown, Sanchez, Mejia, Fourness, and San Jose Canals, parties to this action, this appellant, the Montezuma Canal Company, offered in evidence in the trial court the judgment relied on, filed in the same court in the case of Montezuma Canal Company vs. San Jose Canal Company, et al., known as Cause No. 505, the judgment in which was rendered February 17th, 1897, and which is set forth in full following our 1st Assignment of Error and at (Page 63 et seq., Transcript). The record following the offer of this judgment roll shows that objection was made to the reception of the same in evidence, but no ruling was then made on the objection,

the same "being deferred until the evidence in the case is heard." (Fol. 139, page 67 Transcript). The judgment roll was filed and became a part of the record in this cause, (Fol. 87, page 40 Transcript), wherein the judgment in Cause No. 505 is recited and its effect in adjudging to this appellant 1,000 inches in dry seasons and 2,000 inches in wet seasons expressly recognized. (See Finding XI. following our 2nd Assignment of Error supra.) So whether the records of the trial shows the reception of this judgment in evidence or not is of little moment, the final decision of the Court expressly recognizing it and reciting its rendition and effect, and in no way even attempting to avoid or minimize its legal effect on the rights of this appellant in this case.

With this prior judgment so standing and in effect and expressly recognized by the trial Court, that Court, however, entirely ignores it in its final decree, and treats the rights of this appellant to water as though no such judgment existed, and as though now, for the first time, these rights are to be adjudicated. This, in fact is wherein this appellant claimed, in its appeal to the Supreme Court of Arizona, and now to this Court, that it has been grossly wronged and its established rights to water adjudicated to it by a former valid and subsisting judgment of a court of competent jurisdiction, attempted to be taken from it and given to those very others who, by that judgment, were found and decreed not entitled to them, or rather were found and decreed subsequent in right thereto and to this appellant. As to the other parties to this decree not parties to the judgment in Cause No. 505, of course this appellant makes no claim of error so far as this particular point is concerned, but as to the parties to Cause No. 505, to-wit, the owners of the Brown, Sanchez, Mejia, Michelena and San Jose Canals, whose rights were by that decree adjudged subordinate to those of this appellant, the Montezuma Canal Company, we insist that the same are, and were on the trial of this cause, res adjudicata.

This attempt of the District Court to invalidate and set aside by this judgment its own prior decree, involving the same subject matter and in a suit between the same parties, would be almost ludicrous were it not for the serious consequences which have ensued in the deprivation of this ap-

pellant of the 1,000 inches of water which its shareholders have the utmost need of and upon which they had come to rely for the cultivation of their lands in the dry season, when water is most needed, not only for the raising of crops, but for the preservation of the life of trees, vines and perennial plants, like alfalfa, to the growing of which most of this land is devoted.

That the decree in this cause thus took away the rights adjudged to this appellant by the former decree in Cause No. 505, an inspection will demonstrate. The decree in this cause (Fol. 102, page 51 Transcript), orders that the several parties to this decree are entitled to receive and divert from the Gila River, water sufficient each for his own lands, from time to time, in amounts and in the order of priority as shown in the tabular statement attached. This tabular statement appearing at pages 47 and 48 of the Transcript, gives the names of the different canals and the amounts to which each is "entitled at different stages of water in the river." The figures at the heads of these columns in this table apparently only refer to the years in which water was appropriated, as, 1875, 1878, 1880, etc. The next figures below these dates refer to the supply of water in the river and accretions at the head of each ditch by means of water rising there from whatever cause; the next figures given below indicate the amount to be distributed to each canal at the different stages of the river. Taking the first column of figures, headed 1875, we find a distribution based on a now of 500 inches in the river and an accretion of 60 inches additional rising at the head of the Montezuma Canal. This entire amount, under the former decree in Cause No. 505, giving the Montezuma 1,000 inches in dry seasons, would have gone entirely to the Montezuma, as against the San Jose and Michelena and other canals heading above it in the order named in the table, the owners of all of which canals were parties to that decree, but the Court, by its decree in the present cause, chooses entirely to disregard its own former and still existing decree, and distributes to the San Jose 150 or 115 inches, and to the Michelena 35 inches, leaving only 360 or 375 inches to go to the Montezuma. We make no complaint here as to the various amounts distributed by this decree to the Union, Sunflower and other

canals below the Montezuma, conceding that they, not having been parties to the former decree, their rights as against the Montezuma were not settled by that decree, but we do contend that every inch of water given to the San Jose and Michelena by this decree until the Montezuma is given its full quota of 1,000 inches, was wrongfully taken from the Montezuma and given to parties expressly adjudged by the former decree not entitled thereto until the Montezuma had its full supply of 1,000 inches.

The tables printed in the transcript to this court are not as complete as in the original decree and in the transcript sent up from the District Court to the Supreme Court of Arizona. The figures 150, 35 and 360 in this first column being, in the original decree and in the transcript sent up to the Supreme Court of Arizona, and also in the original transcript sent up to this Court, enclosed in circles, evidently indicating the exclusion of them for the purposes of this distribution, and leaving the figures not so enclosed, 115, 35, and 375, as the figures to be taken as indicating the exact amount of distribution; the decree, however, was rendered with these figures enclosed in circles and without any explanation, and was, therefore, as we complained in the Court below, almost impossible of interpretation, if not so absolutely conflicting and contradictory as to be of no use whatsoever.

An examination of the other columns of figures in this table at page 47 of the Transcript discloses still further the utter disregard of the trial court of its previous and still subsisting judgment. Under the head of 1878, it appears that with the 750 inch head in the river and a 100 inch accretion rising at the head of the Montezuma Canal, the commissioner placed in charge of water distribution by this decree takes 320 or 260 inches for the San Jose, and 60 inches for the Michelena ditch, leaving only 500 inches for the Montezuma. With a 1,000 inch head, as appears at the column headed 1880, and 100 inches accretion at the head of the Montezuma, the commissioner is required to distribute only 640 inches to the Montezuma, while to the San Jose he is to distribute 480 or 400 inches, and to the Michelena 80 inches, and so the distribution goes throughout the decree.

Not until there is 2,000 inches of flow in the river for distribution is the Montezuma Canal given 1,000 inches for carriage to its consumers by the terms of this present decree, and out of that 2,000 inches there is ordered distributed to the San Jose, 600 inches, and to the Michelena, 110 inches, as appears under the column headed 1883, whereas under the former decree in Cause 505, the Montezuma was absolutely entitled to its full 1,000 inches of water in the dry seasons before the San Jose or Michelena Canals should receive an inch.

By the former decree in Cause 505, when the supply at the head is less than 1,000 inches, the Montezuma is entitled to it all, as against the San Jose and the Michelena. Courts cannot lightly disregard their previous decrees, nor have they any authority to modify or set them aside after the term at which they were rendered. The learned judge of the trial court seems to have overlooked this well established rule, which is clearly and strongly stated in another case decided by him as a justice of the Supreme Court of the Territory of Arizona.

National Metal Co. vs. Greene Con. Cop. Co.,
80 Pac. 397.

What the court is without power to do directly, it cannot do by any indirection and by refusing to recognize or by ignoring its judgment in another cause when offered and plead subsequently, and should it do so, its decree must be reversed upon appeal.

Nor can it make any difference in the application of this rule that more parties are brought into the second suit. Those who were parties to the first are nevertheless bound by the former decree. Uhfelder v. Levy, 9 Cal. 607; Boulder Ditch Co. vs. Lower Boulder Ditch Co., 43 Pac. 540. There being no allegation or proof of any change of conditions since the former decree, that decree is conclusive and binding now upon the parties. City of Los Angeles vs. Baldwin, 53 Cal. 469.

The injunction which was granted in the former decree in favor of this appellant and against the San Jose and other canals taking water above this appellant, was still in full force and effect when this cause was tried, and

we do not deem it necessary to cite authorities to show that a permanent, final injunction, granted by a court of competent jurisdiction, cannot be modified or set aside by the same court at a subsequent term, either directly or indirectly, except for fraud or some such defect, of which in this case there was not even a suspicion arising, much less was there any attack made upon the validity of the former decree. A substantial wrong having been done this appellant by the trial court's disregard of its former decree settling the rights of these parties as to this same subject matter should, we respectfully urge, command a reversal of the decree and a new trial or a modification of the decree herein restoring this appellant to its settled and adjudicated rights to water in the dry and wet seasons as against those who were parties to the former decree.

The Supreme Court of Arizona, in its decision, has attempted to avoid the force of the argument of the appellant based upon the evident disregard of the lower court of its former decree in this matter, by refusing to consider the appellant's assignment of error in this respect, for the reason, as alleged by that court, that the reporter's transcript on the appeal had not been certified as a bill of exceptions, and therefore the action of the trial court in that respect could not be reviewed. (See opinion of Supreme Court of Arizona, Fol. 145, page 70 Transcript).

It is true that at the time this cause was appealed the Supreme Court of Arizona had adopted a rule reading as follows:

"The extension of the reporter's notes provided by Section 1486, Revised Statutes, to be made a part of the record must be made, certified and filed during the term at which the judgment was rendered, or within such reasonable time thereafter as shall be allowed by the court, or judge thereof, by an order duly entered on the minutes or filed with the clerk. Such transcript as may thus be made out, certified and filed shall be deemed a statement of facts, but shall not be treated as embodying in the record any ruling of the court made during the trial, unless the same shall be allowed and signed by the judge in the same manner as required of a bill of exceptions." (Last par. Rule 2, Supreme Court Rules, 8 Arizona VI.)

At the same time, however, there was in force in Arizona an express statute making the reporter's transcript a part of the record in a cause on appeal without any certification, by the judge or otherwise except by the reporter.

"Either party to a suit may, if he so desire, make the oral evidence given in a case a part of the record of the case, either by a statement of facts or, at his election, by causing the reporter's notes of the trial to be extended by him, and duly certified over his hand as being a full, true and correct copy of all the questions propounded to jurors and witnesses and their answer thereto, as well as all remarks, rulings, opinions and judgments given and rendered during the trial hereof by the judge presiding at the trial, anl that it contains all the oral evidence given in the case; but in no case shall such extenled notes contain a copy of any written evidence, depositions, exhibits or arguments of counsel. When thus made, certified and filed, it shall constitute a part of the record of the case." (Par. 1486 Revised Statutes of Arizona of 1901, (Civil Code).

"Every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence, or offered in evidence and rejected by the Court, need be incorporated in a statement of facts in order to make it a part of the record." (Par. 1485 Revised Statutes of Arizona of 1901, (Civil Code).

It is, therefore, respectfully submitted that such rule above quoted was in contravention of the statute governing appeals and was beyond the power of the Supreme Court of Arizona to make. State ex rel. Hoffman vs. Withrow, 135 Mo. 376; s. c. 36 S. W. Rep. 896; People vs. Howard, 31 Cal. 101. A rule of court which contradicts or exceeds the statute should not be enforced. Calhoun vs. Crawford, 50 Mo. 458.

The Supreme Court of Arizona, therefore, erred in refusing to consider the record before it, and lawfully before it, on this appeal.

In any event, there is before this Court, and there was before the Supreme Court of Arizona, the very decree re-

lied upon by the appellant in Cause No. 505 in the trial court if only the judgment roll be considered as the record, for, as stated before and as will be seen by an inspection of the findings of the trial court, this old decree in No. 505 was copied into and made a part of the findings of the trial court upon which the decree herein was based, and upon which it must depend for its validity. (Finding XI., at Fol. 87, page 40 Transcript). Nevertheless, it was absolutely ignored, and all the adjudicated rights of this appellant therein settled set at nought, without so much as any excuse being attempted for so doing.

There was, therefore, fundamental error in the judgment of the trial court in this cause, which should have been corrected by the Supreme Court of Arizona, and will be corrected here, despite the rule of the Supreme Court of Arizona under which that court sought to avoid consideration of that issue. Ward vs. Sherman, 192 U. S. 168.

Second.

Coming now to the second question involved in this appeal, viz, that based upon the action of the trial court, as affirmed by the Supreme Court of Arizona, in the appointment of a so-called commissioner to sieze and control and make rules for the distribution of the waters of the Gila River rightfully belonging for use to this appellant, and taxing this appellant for the salary of such water commissioner, and which is brought before this court by appellant's assignments of error Nos. 4, 5 and 6, at page 83 of the transcript, we have to say:

Neither the plaintiffs nor the defendants sought, by their pleadings in the trial court, the appointment of such an officer as a commissioner to control their proportions of water, and such appointment was therefore outside of the issues and beyond any relief sought in the case. This action was brought to obtain an injunction restraining wrongful interference with water rights alleged to be in the plaintiffs. The defendants, for themselves, each denied the prior rights of the plaintiffs, and while some prayed judgment establishing their rights to water, others, among whom was this appellant, prayed the dismissal of the complaint of the plaintiffs and the cross bill of the San Jose Canal Com-

pany. The trial resulted in a decree establishing the order of priority and amount of water which each canal company and canal owner parties thereto was entitled to have and divert from the Gila River, and enjoining the other parties to the suit from in any way interfering with such established rights. There, it would seem, the powers of the court ended. No statute or rule of law can be found justifying the court in appointing an executive officer to sieze and control the property of litigants who seek only an injunction to restrain deprivation of their rights, there being no insolvency or other facts alleged sufficient to warrant the appointment of a receiver or any other like officer at the expense of the parties, when no allegation or proof is made that the injunctions issued by the Court would not be obeyed. If the injunctions alone would not restrain the parties, surely the arm of the Court has not been so paralyzed that punishment for disobedience to its orders could not be meted out under the ordinary rules of procedure. Whether the Court had power to make such an appointment to carry out a decree which definitely and positively settled all the rights of the parties and left nothing but strictly executive duties to be performed, however, is not in this case. Here the Court has undertaken to confer upon an officer unknown to the law, judicial powers and duties which are only conferred upon courts. An examination of the many powers so decreed to be conferred upon this commissioner will satisfactorily demonstrate the invalidity of his appointment and of his powers.

He is given power to enter upon certain of the canals and ditches owned and operated by parties to this action and have the supervision and direction of the placing proper gates, dams and other means for the control of the river at the heads of the canals or at other points on the banks of the canals as he may direct at the expense of the parties hereto interested therein. (Transcript, Fol. 103, page 51).

He is given power to make such rules and regulations as he may deem proper and expedient to be observed by the parties hereto for the distribution and use of water. (Transcript, Fol. 104, page 52).

He is given power to superintend and control the distribution and use of water by the parties hereto and by

the proper practice (whatever that may be) direct the diversion of such water from the river and its conveyance to the place of use by whatsoever means he may deem best to secure the greatest economy therein. ((Page 52, Transcript).

He is given power to direct the distribution of the water in accordance with the rights of the parties as to the extent of land irrigated and order of priority and date of appropriations as in this decree established. And yet the Court has failed to find, in its decree, the date of appropriation of any water upon any particular land.

He is given power to so distribute the water that no lands shall be served with an amount of water in excess of that beneficially used thereon. (Page 52, Transcript).

We believe it must thus sufficiently appear that the Court below has attempted to confer all the functions of a Court upon this gentleman who has been made the custodian of the waters of the Gila River, heretofore appropriated by the farmers under the several canals affected by this decree. Not only is he authorized to make rules and regulations for the distribution of such waters, but he is to control the distribution and use, by whatsoever means he may deem best, and to him is committed the power to determine whether or not the water is beneficially used on any land, and to deprive of or give to such land a supply of water. This is going even beyond the Utah case, where the Court decreed that a head of water should be distributed to certain lands by the Commissioner provided for by law and which decree was reversed for uncertainty. Smith vs. Phillips, 23 Pac. 932.

Courts are established to settle controversies brought before them, but they are without power to delegate their judicial functions to any. Even Receivers and Masters in Chancery can only act within strict rules. No question of procedure or as to their rights or duties is left open for their determination. If the Court undertake to delegate these judicial functions to an executive officer of the Court, its decree is to that extent void. Bradley Fertilizer Co. vs. Taylor, 17 S. E. Rep. 69 (N. C.)

But not only is this gentleman so appointed by the Court given these judicial powers, but he is empowered to

enforce such rules and regulations and decrees as he may make by entering upon the private property of the parties to this action and depriving them of the use of the thing which has been given them by the law of appropriation, the water without which their lands are valueless and the fruits of their labor are rendered worthless.

Further power given this so-called Commissioner is that of collecting a salary from this appellant, who never sought his services and to whom they are of no value, in the amount of $23.75 each and every month in every year. (Fol. 105, p. 52, Transcript). And this despite the fact that the Court has found (Findings of Fact IV, page 36 Transcript) that in ordinary seasons the volume of water in the river is sufficient to supply the entire acreage under all these canals with water, and hence it is only in extraordinarily dry seasons that he will be called upon for any services whatsoeevr.

It is respectfully submitted that if the powers of the District Court go to the extent this decree indicates, there is no reason why it cannot appoint as many Commissioners as there are canals and fix for each a salary which would soon make the Court Commissioners the only persons able to live in the Upper Gila Valley.

We therefore respectfully submit that the judgment of the Supreme Court of Arizona in this cause should be reversed, or at least modified so as to restore this appellant to the rights it has heretofore had adjudged to it as against the defendants owning the San Jose, Michelena, Brown, Fourness and Mejia canals, under the decree of the District Court of Graham County, under date February 17th, 1897, in Cause No. 505, and also modified so as to limit the decree to the injunctions prayed for and properly granted and to set aside the appointment of the so-called water commissioner and strip him of the discretionary powers attempted to be granted him by the Court.

Respectfully submitted,
JOHN J. HAWKINS,
Attorney for Appellant Montezuma Canal Company.
THOMAS ARMSTRONG, JR.,
C. L. RAWLINS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 217.

MONTEZUMA CANAL COMPANY,
Defendant and Appellant,
vs.
SMITHVILLE CANAL COMPANY et al.,
Plaintiffs and Appellees.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEES.

STATEMENT.

This appeal is prosecuted for the purpose of obtaining a review by this Court of the judgment of the Supreme Court of the Territory of Arizona, affirming the judgment and decree of the District Court of Graham County, Arizona.

It is essential, therefore, to point out what was before the Supreme Court of Arizona for review. But in order that this may intelligently appear, a brief statement of the facts out of which this controversy arose should here be made.

The upper Gila Valley, in which this controversy arose, comprises a strip of land about 30 miles in length and with an average width of about four miles, and lying on either side of the Gila river, which flows through the length of the valley. These lands are naturally arid and barren without irrigation, but are in part irrigable from the waters of said river, and about 26,000 acres of said lands are so irrigated and made productive.

Between the point where the river enters this valley and its exit, 25 irrigating canals have been constructed, about equally divided between the north and south banks of the river, of varying capacity and varying in the area of lands served from a few acres to several thousand acres. The names of these canals in the order of their position from the point where the river enters the valley, the date of the commencement of their construction, and the acreage irrigated from each canal during each year from its initiation to the commencement of this action, is as set forth in the tables on pages 42 and 43 of the Abstract of Record. All of these canals are operated by companies of the same name as the canals, some of which are mere associations of individual water users under the canal, but some of which—notably the appellant, the Montezuma Canal Company and the San Jose Canal Company, one of the appellees—are corporations. But in all cases, whether the organization be corporate or otherwise, the individual interests in the water diverted by each canal are represented by certificates or water rights, which are held only by individual water users under the canals. Each water user receiving upon his land such proportion of the water diverted from the river and flowing in the canal as the number of his certificates or water rights bears to the whole number of outstanding certificates issued by the canal company from which his land is irrigable.

This action was originally brought by the Smithville and Central Canal Companies against the canal companies taking water from the river at points above them, and before the taking of the testimony, the Court, realizing the impossibility of establishing the rights of those parties without affecting the distribution of all the water in the river, ordered all the canal companies taking water from the river, and all the water users under the several canals to be made parties to the action. This was done, and all the companies and water users appeared and answered. The Court therefore had before it all the parties whose interests could be affected by the decree.

A vast amount of testimony was taken, findings of fact were filed and decree entered determining the relative rights of the several canal companies to divert water from

the river at the ever-varying stages thereof. The measure of the rights of the canal companies, as organized entities, to divert water from the river being the right of appropriation and application to a beneficial use, of the water so diverted by occupants of the lands served thereby, such occupants became and were necessary parties to the action and the real parties in interest.

The decree of the trial court then provides for a commissioner of the court to carry out its decree by regulating the amount of water which each canal company diverts from the river at its ever-varying stages in accordance with the tabulation made by the Court in its decree.

Of all the very numerous parties to this cause, both plaintiff and defendant, one only—the Montezuma Canal Company—and that one not an appropriator of water, but a mere carrier, has sought to have the decree in this case reviewed, and for that purpose it took up to the Supreme Court of Arizona, and has brought to this Court, only a fragmentary part of the record in the trial court. This record consists of the Amended Complaint of plaintiffs, the answer and cross complaint of the San Jose Canal Co., the answer of the Montezuma Canal Co. to the plaintiffs' complaint and to the cross complaint of the San Jose Canal Co., and the answers of two only of the individual defendants, viz., Frank Dysart and Sixto Garcia, the minute entries, findings, judgment and motion for new trial. The pleadings of all the other defendants are omitted. There was no bill of exceptions and no statement of facts, and though what purports to be a transcript of the reporter's notes of the evidence was filed in the Supreme Court, it was not certified by the trial judge as required by the rules of the Supreme Court in order to constitute it a bill of exceptions.

ARGUMENT.

We think this Court is without jurisdiction to review the decision of the Supreme Court of the Territory of Arizona in this case because the matter in dispute does not exceed $5,000.

It is true that appellant has filed the affidavit of its president that the effect of the decree is to deprive the appellant of the right to carry and deliver 100 inches of water from the Gila river to appropriators thereof, and that the loss of this right to carry has diminished the value of its property and increased the value of other canals to the extent of $5,000. But the Court will note that this is an ex parte affidavit, filed without leave of court, and without notice to appellees, and therefore of little probative force.

Wilson vs. Blair, 119 U. S. 387.

Moreover, we think that in spite of this affidavit, the Court can see from this record that this appellee has no financial interest in this cause. The whole purpose of this action and the effect of the decree is to settle and determine the priority of appropriation of the waters of the Gila river for irrigation by agriculturalists. The appellant is not an appropriator of water, or an occupant of irrigable lands. It does not assert any right as such appropriator, and the real appropriators to whom it carries and delivers water are parties to this action and are making no complaint of the decree. If the value of the property of appellant is affected by the decree, as alleged in the affidavit of value, it is only incidentally and collaterally affected and not directly so. Its right to divert and carry water from the river at all is a derivative right, and the parties from whom it derives the right—the real parties in interest—are parties to the action and are not attempting to appeal from the judgment.

We think this appeal should be dismissed for want of jurisdiction.

The appellant has assigned seven alleged rulings of the Supreme Court of Arizona as errors, for which it asks this

Court to reverse the devision of that Court. The assignment of errors appears on page 82 of the Abstract of Record.

It will be noticed that these seven alleged errors fall under two heads.

Nos. 1, 2, 3 and 7 complain of the action of the Supreme Court in refusing to review the action of the trial court in failing to give the force and effect claimed for it, to the alleged judgment of the District Court of Graham County, Arizona, in case No. 505 of said Court. (This alleged judgment appears on page 64 of the Abstract of Record.)

Nos. 4, 5 and 6 complain of the action of the trial court in appointing a commissioner to execute the decree in this cause.

We shall discuss these assignments of error as thus grouped and in the order above stated.

In considering the first group of assignments of error the Court will note that the appellant brought before the Supreme Court no bill of exceptions or statement of facts certified by the Court below, as provided by the Statutes of Arizona and the rules of the Supreme Court.* There was therefore nothing to bring before the Supreme Court for review, the ruling of the trial court in refusing to admit in evidence the judgment and decree in Case No. 505 of that Court.

But even if the record of the judgment in question had been admitted in evidence by the trial court, and the action of that Court in not giving such judgment the full effect claimed for it had been properly brought before the Supreme Court for review, we do not think the appellant would have been in any better position in regard to it, for the following reasons:

First. In the action No. 505, in which the judgment under discussion was entered, the Montezuma Canal Company in its corporate capacity was the sole plaintiff and the

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*The Statute of Arizona regarding Bills of Exception, and the rules of the Supreme Court in respect thereto, are set forth in an appendix to this brief.

San Jose Canal Company in its corporate capacity, and a few individuals, none of whom were appropriators or users of water diverted through said San Jose Canal Company, were defendants. The actual appropriators and users of the water diverted by the last-named canal company were not made parties. They were not before the Court. Their rights as appropriators and users of the waters of the river were individual rights, not dependent upon the right of the corporation owning the canal through which they had been accustomed to receive their appropriation of water. Such right of appropriation would have remained intact, though the carrying corporation should forfeit its franchises and be dissolved, or should fill up its canal or otherwise refuse or neglect to carry the water from the river for their use. It would seem, therefore, that in any action having for its object the determination of the extent or amount of that appropriation, the actual appropriators are necessary parties and have a right to be heard.

Second. We think the judgment in Case No. 505 is void for uncertainty.

The judgment declares the amount of water which the Montezuma Canal shall have the prior right to divert "during the dry seasons of the year when the water is low and scarce in said river" and "during the wet seasons of the year when the water is high and plentiful therein."

Who can say when one of these seasons shall have merged into the other? It is not likely that the parties will agree. If it should be held that the 1,000 inches decreed to the appellant in dry season, when the water is low and scarce, means that the Montezuma must at all times have a prior right to 1,000 inches, before the San Jose gets any, then it must be equally true that the water could not be construed to be "high and plentiful' as long as any of the canals, including the San Jose, were getting less than they could profitably use. The result would be that in times of great scarcity the Montezuma would get a little water while the San Jose got none; in times of moderate flow when there was, for instance, 4,000 inches at the head of the San Jose, it might take 3,000 inches, leaving the Montezuma only 1,000, because the water could not be said to be high

and plentiful as long as any canal above the Montezuma was getting less than it could profitably use. We therefore contend that this decree is void for uncertainty.

We think that any decree settling the relative rights of appropriators from the same stream must be a flexible decree, adjustable to the ever-varying flow of the water in the river, which in arid countries, where water is the life blood of agriculture, varies not only from year to year or from season to season, but from week to week and often from day to day, dependent upon local storms upon the watershed drained by the stream in question.

Third. We do not think any judgment or decree of court can pass or confirm to any canal company, which is not itself an appropriator, the permanent title to or right to divert any definite flow of water from a public source. The right to divert water from a public source of supply is dependent upon ever-varying conditions of supply and requirement, and any decree, to be effective, must be made in such form as to be adaptable to those conditions.

There is only one other ground of complaint set forth in appellant's assignment of errors, and that is that the Court erred in appointing a water commissioner—one Albert T. Colton—to carry out the Court's decree. In this we think there was no error.

In the exercise of its common law and chancery jurisdiction it is certainly within the power of a court of general jurisdiction to provide all the necessary means to carry out its judgments and decrees. This power is essential to the exercise of the general jurisdiction of such court, as otherwise they would become impotent and their decrees, mere academic pronunciamentos. At common law, it is true, the Sheriff is the executive officer of the court and executes all its common law judgments. But from time immemorial it has been the practice of courts of chancery to appoint an officer—usually termed a "Master in Chancery"—to execute its chancery decrees, and the power of a court of general jurisdiction to appoint an executive officer for that purpose has never been questioned in this Territory or elsewhere to our knowledge.

But we are not without statutory authority for that purpose. By Par. 1431. R. S. 1901, under the head of "Judgments" it is provided that "The Court shall cause its judgment and decree to be carried into execution * * *" (See Appendix.) This is certainly broad enough to give the Court all the power in that direction which it has exercised in this case, and the necessity of so exercising its powers in the appointment of a "Water Commissioner" to carry out its decree is obvious. The appellant is well aware that without such officer, the decree of the Court could not and would not be enforced.

The decree becomes operative as soon as the water in the river reaches such a stage that there is insufficient to supply all the canals to their full capacity and during all such times—which is much the greater portion of the time—it is essential that an executive officer of the Court be continuously upon the river setting water gauges, raising and lowering water gates, and otherwise regulating the amount diverted by each canal in accordance with the ever-varying volume of water in the river, according to the tabulated statements of the Court in its findings and decree. Rules and regulations for this purpose must be formulated by such executive officer, and the granting of power to make such rules and regulations as are reasonable and necessary to carry out the provisions of the decree is not granting to such officer judicial powers.

The decree provides that any party to the action may apply to the Court at any time for any proper modification of the decree or for supervision and direction of the commissioner. If, therefore, the commissioner is not properly executing the decree, or in its execution is discriminating against the appellant, the door is open for complaint to the Court which entered the decree, for relief from its real or fancied grievances. It does not appear that any such application has been made, so we must assume that the commissioner has not exceeded his powers or executed those powers harshly or oppressively.

Though perhaps not perfect in the adjustment of the rights of all the parties to this cause—as, indeed, what decree in a case of this kind could be?—yet the decree in this case and its intelligent and impartial execution by the water

commissioner has given almost universal relief and satisfaction through the upper Gila Valley. This is manifest from the fact that of the very numerous parties to this action, all, with the single exception of the appellant in this case, have acquiesced in the findings and decree and in its execution by the water commissioner. It has changed the diversion and use of the waters of the Gila river from a state of practical anarchy in which might made right, to a state of orderly submission to the directions of the water commissioner, whereby all the water users in the valley receive the amount of water to which they are entitled, notwithstanding the fact that the heads of the canals through which they receive the water may not be as advantageously placed for the *vi et armis* diversion of the water, as some other canals. And if the appellant canal company has by virtue of this decree and the means provided for its execution been deprived of some of the water, in certain stages of the river, which, by reason of the situation of its head, it had been able to take, and had taken from the river, when left to its own devices, "'tis a consummation devoutly to be wished." An examination of the tabulated statements prepared by the Court with infinite patience and pains reveals the fact that the appellant at every stage of the river is given a larger volume of water than any other canal, and at low stages, a greater volume in proportion to the acreage it serves than any other canal in the valley. It should be the last of the parties to this action to make complaint.

We believe no substantial or harmful error is shown in this record which requires a reversal of the case, but that substantial justice has been done to every interest affected.

During nearly two years which has elapsed since the promulgation of this decree and under its execution by the water commissioner, the valley has developed and uniformly prospered as never before, and we cannot look with complacency upon the prospect of reverting to the former chaotic distribution of the water supply of the valley.

We think the judgment of the Supreme Court of Arizona affirming the judgment of the trial court should be affirmed.

Respectfully Submitted.

WALTER BENNETT,

Attorney for Appellees.

APPENDIX

FROM THE REVISED STATUTES OF ARIZONA, 1901.

CHAPTER XVII.

BILL OF EXCEPTIONS.

1458. Sec. 249.) Whenever in the progress of a cause either party is dissatisfied with any ruling, opinion or other action of the Court, he may except thereto at the time the same is made or announced, and at his request time shall be given to embody such exception in a written bill.

1459. (Sec. 250.) No particular form of words shall be required in a bill of exceptions, but the objection to the ruling or action of the Court shall be stated, with such circumstances or so much of the evidence as may be necessary to explain it and no more, and the whole as briefly as possible.

1460. (Sec. 251.) The bill of exceptions may contain all the evidence, or so much thereof as may be necessary to explain the exceptions, and if all the evidence or sufficient thereof to explain the exceptions is contained in the bill of exceptions, no statement of facts shall be necessary. . .

1461. (Sec. 252.) The party preparing the bill of exceptions may include therein as many exceptions as he may deem necessary or proper, and the signature of the judge at the end of the bill of exceptions shall be a sufficient authentication thereof.

1462. (Sec. 253.) Where the statement of facts contain all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out the evidence in the bill of exceptions, but it shall be sufficient to refer to the same as it appears in the statement of facts.

1463. (Sec. 254.) The ruling or other action of the Court in the giving, refusing or qualifying of instructions to the jury shall be regarded as excepted to in all cases.

1464. (Sec. 255.) Where the ruling or other action of the Court appears otherwise of record, no bill of exceptions shall be necessary to reserve an exception thereto.

1465. (Sec. 256.) It shall be the duty of the party taking any bill of exception to reduce the same to writing, and present the same to the judge for allowance during the term, or within ten days after the term, if tried less than ten days before the end of the term, and the time may be further extended twenty additional days: Provided, The order making such extension be made before the expiration of the term of court.

1466. (Sec. 257.) If the same shall be handed to the opposite attorney or lodged with the clerk, it shall be deemed to have been presented to the judge at that date, and the bill of exceptions as finally settled shall be signed by the judge as of that date.

1467. (Sec. 258.) It shall be the duty of the party taking any bill of exceptions to reduce the same to writing, and present the same to the judge for allowance during the term and within ten days after the conclusion of the trial.

1468. (Sec. 259.) It shall be the duty of the judge to submit such bill of exceptions to the opposite party or his counsel, if in attendance on the Court, and if the same is found to be correct, it shall be signed by the judge without delay and filed with the clerk.

1469. (Sec. 260.) Should the judge find such bill of exceptions to be incorrect, he shall suggest to the party or his counsel who drew it such corrections as he may deem necessary therein, and if they are agreed to, he shall make such corrections and sign the same and file it as provided in the preceding section.

1470. (Sec. 261.) Should the party not agree to such corrections, the judge shall return the bill of exceptions to him, with his refusal indorsed thereon, and shall make out, sign and file with the clerk such a bill of exceptions as will, in his opinion, present the ruling of the court in that behalf as it actually occurred.

1471. (Sec. 262.) Should the party be dissatisfied with the bill of exceptions filed by the judge, as provided in the preceding section, he may, upon procuring the signatures of three respectable bystanders, citizens of this Territory, attesting the correctness of the bill of exceptions as presented by him, have the same filed as a part of the record of the cause, and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause within ten days after the filing of such bill of exceptions, and to be considered as a part of the record relating thereto.

CHAPTER XIX.

THE RECORD.

1486. (Sec. 277.) Either party to a suit may, if he so desire, make the oral evidence given in the case a part of the record of the case, either by a statement of facts or, at his election, by causing the court reporter's notes of the trial to be extended by him, and duly certified over his hand as being a full, true and correct copy of all the questions propounded to jurors and witnesses and their answer thereto, as well also all remarks, rulings, opinions and judgments given and rendered during the trial thereof by the judge presiding at the trial, and that it contains all the oral evidence given in the case; but in no case shall such extended notes contain a copy of any written evidence, depositions, exhibits or arguments of counsel. When thus made, certified and filed, it shall constitute a part of the record of the case.

FROM THE PUBLISHED RULES OF THE SUPREME COURT OF ARIZONA.

RULE 2.

BILLS OF EXCEPTIONS AND STATEMENTS OF FACTS.

I.

Bills of exceptions and statements of facts may be consolidated into one and the same paper; but in all cases the same shall be in narrative form, tersely and succinctly stated.

Whenever any objection is made to evidence or to any question propounded to a witness, and an exception is taken to the ruling of the trial court thereon, in every such case the question and answer of the witness shall be inserted *totidem verbis.*

The extension of the reporter's notes provided by Sec. 1436 (1486), Revised Statutes, to be made a part of the record must be made, certified and filed during the term at which the judgment was rendered, or within such reasonable time thereafter as shall be allowed by the Court, or judge thereof, by an order duly entered on the minutes or filed with the clerk. Such transcript as may thus be made out, certified and filed shall be deemed a statement of facts, but shall not be treated as embodying in the record any ruling of the Court made during the trial, unless the same shall be allowed and signed by the judge in the same manner as required of a bill of exceptions.

FROM CHAPTER XIV, REVISED STATUTES OF ARIZONA, 1901.

ENTITLED JUDGMENTS.

1428. (Sec. 219.) The judgment of the Court shall conform to the pleadings, the nature of the case proved, and the verdict, if any and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity.

1431. (Sec. 222.) The Court shall cause its judgment and decree to be carried into execution, and when the judgment is for personal property, and it is shown by the pleadings and evidence and verdict, if any, that such property has an especial value to the plaintiff, the Court may award a special writ for the seizure and delivery of such property to the plaintiff, and the Court may, in addition to the other relief granted in such case, enforce its judgment by attachment, fine and imprisonment.

1438. (Sec. 229.) The Court may render such other judgments and in such form as may be authorized by law.

MONTEZUMA CANAL COMPANY *v.* SMITHVILLE CANAL COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 1. Argued October 21, 24, 1910.—Decided November 28, 1910.

Where the trial court makes findings of facts and states conclusions of law thereon but certifies no rulings in respect of evidence, and the Supreme Court of the Territory enters a general judgment of affirmance, manifestly based upon the correctness of such findings of fact, they furnish a sufficient statement for the appeal; and, in this court, the question is whether they are sufficient to support the decree. *Stringfellow* v. *Cain*, 99 U. S. 610.

Notwithstanding there may have been a prior appropriation of water, if the rights of appropriators were adjudicated in a suit of which the parties had notice, the judgment in that suit may be pleaded as *res judicata* in a subsequent suit to determine the rights of appropriators, and the amount awarded to an appropriator by judgment in the first suit cannot be reduced.

The fact that it is within the legislative power to provide administrative machinery to supervise the common use of water, does not render invalid the decree of a court providing such machinery to carry out a particular decree if the court deems it necessary and proper so to do.

As the laws of Arizona authorize the Supreme Court to cause its judgments to be carried into execution, that court does not transcend its authority in appointing a commissioner to supervise the

taking of water from a stream by the various appropriators to whom its common use is awarded and in apportioning the expense *pro rata* between them.

11 Arizona, 99, reversed.

THE facts, which involve the rights of appropriators of water of a river in Arizona, are stated in the opinion.

Mr. Thomas Armstrong, Jr., with whom *Mr. John J. Hawkins* and *Mr. C. L. Rawlins* were on the brief, for appellant.

Mr. Walter Bennett for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

The decree of the Supreme Court of the Territory of Arizona (11 Arizona, 99; 89 Pac. Rep. 512), which is appealed from, affirmed a decree of a District Court of the Territory determining the rights of appropriators within the county of Graham to the waters of the Gila River.

In the brief of counsel for the appellee it is suggested that the appeal should be dismissed because the matter in dispute does not exceed the sum of five thousand dollars, and because the appellant has no substantial financial interest in the cause. We think, however, that the record sufficiently shows that the jurisdictional amount is involved, and that the appellant has such interest as entitles it to prosecute the appeal. We shall, therefore, consider the case upon the merits.

The issues below were made up by an amended complaint, in which the Smithville Canal Company and the Central Canal Company and the water-users under these canals were plaintiffs, and the Montezuma Canal Company and other canal companies, as also the water-users under such canals, were defendants. The general nature of the controversy is indicated by the character of the

decree entered in the District Court just stated. Incorporated in the answer of the Montezuma Canal Company and its water-users were averments, in the nature of a cross bill against the San Jose Irrigating Company and the San Jose Extension Canal Company and various other defendants, setting up a former judgment recovered in the District Court of Graham County by the Montezuma Canal Company as settling between the Montezuma Company and said co-defendants rights in the water of the river. The San Jose Irrigating Company, it is to be remarked, was incorporated in 1892, and in 1904 the San Jose Extension Canal Company was incorporated, and undertook the management, repair and operation of a part of the canal previously under the control of the San Jose Irrigating Company.

The trial court made findings of fact and stated conclusions of law thereon, but certified no rulings in respect to the admission or rejection of evidence. The Supreme Court of the Territory made no express findings of fact, but entered a general judgment of affirmance, manifestly based upon the correctness of the findings of the trial court. Under such circumstances the findings of the District Court furnish a sufficient statement of the facts for the purposes of this appeal. *Stringfellow* v. *Cain*, 99 U. S. 610. The question for decision, therefore, is whether such findings are sufficient to support the decree. *Ib.*

We are concerned, however, only with the error assigned by the Montezuma Canal Company, as that company alone appealed to the Supreme Court of the Territory, and it is the only party to the record now seeking a reversal of the judgment of affirmance entered by the appellate tribunal.

The contentions urged by the Montezuma Company are twofold: First, that due effect was not given to the prior judgment which it pleaded and which determined its rights in the water of the Gila River as against the

appropriators of water from that river at points above the head of its canal; and, second, that error was committed in the appointment of a so-called water commissioner, charged with the duty of distributing the water among the different canals according to the adjudged priorities. There being then no controversy in respect to the rights to water decreed in favor of the canals situated below the head of the Montezuma Canal Company, the findings in respect to those canals need not be particularly referred to.

Before stating the contents of the decree which was entered in the trial court we make a condensed statement of the facts embodied in the findings upon which the decree was based, in order to a comprehension of the controversy arising for determination.

There are 23,728 acres of land in the county of Graham, Territory of Arizona, which are irrigated by water diverted from the Gila River by means of twenty-five ditches or canals. These canals extend from a point in section 29, township 6 south, range 28 east, at first in a southwestwardly and then in a northwestwardly direction, to a point forty-one miles distant at the northeast corner of the southeast quarter of section 35, township 4 south, range 23 east. Commencing with the head of this irrigation system the canals in question, in their order as respects the flow of the waters of the river and the number of acres irrigated by each canal, are as follows: Brown, 100 acres; Sanchez, 400 acres; Mejia, 320 acres; Fourness, 260 acres; San Jose, 3,000 acres; Michelena, 450 acres; Montezuma, 3,750 acres; Union, 2,900 acres; Sunflower, 400 acres; Graham, 962 acres; Central, 2,675 acres; Oregon, 1,100 acres; Smithville, 1,760 acres; Bryce, 515 acres; Dodge, 450 acres; Nevada, 800 acres; Curtis, 800 acres; Kempton, 850 acres; Reid, 100 acres; Ft. Thomas, 960 acres; Thompson, 240 acres; Military, 400 acres; Saline, 46 acres; Zeckendorf, 500 acres. The Montezuma Canal

was first constructed. The six canals situated above the head of that canal were constructed as follows: The San Jose and the Michelena in 1874, the Mejia in 1877, the Sanchez in 1883, the Fourness in 1891 and the Brown in 1896. The first canal below the Montezuma is called the Union, and was constructed in 1879. Among other things it was found that the Union Canal "carries water for one hundred acres that was reclaimed in 1874 and irrigated by water that was then diverted from the river and carried to the land by the Montezuma Canal. . . ."

Embodied in the "conclusions of law" made by the court is a statement that William Ellsworth and other named individuals "were the persons or successors in interest to the persons who in 1875 appropriated water for and applied it to the first 300 acres of land" in certain named sections, "and who are diverting and carrying water thereto through the San Jose Canal. . . ."

One-half of a miner's inch per acre was found to be necessary for the irrigation of the lands served by the various canals. It was further found that a surface flow of 7,500 miners' inches in the Gila River at the head of the irrigation system furnished more water than is needed to irrigate the entire acreage shown by the evidence to have been in cultivation in the year 1904; and it was also found that "there is a greater flow than this amount during the larger part of the year, so that the amount of water available for irrigation purposes is more than one-half of a miner's inch per acre for a greater length of time each year than the time during which the supply is less than one-half inch per acre."

Substantially all of the canals referred to are now controlled by incorporated canal companies, respecting whom the trial court found as follows:

"The different incorporated canal companies, who are parties plaintiff and defendant herein, are duly and regularly incorporated under the laws of this Territory, and

own and control the several canals as alleged in the pleadings herein, which canals were originally operated by unincorporated partnerships or societies, and the present corporations, parties hereto, are the successors to the unincorporated owners of the several canals, and are in every instance carrying the water for the use of the land owners or the successors in interest of the land owners who were the original appropriators of the water carried therein for irrigation purposes. None of the parties hereto have been engaged or are now engaged in carrying water for hire, and none of the incorporated companies, parties hereto, have appropriated any water in their corporate capacity. None of the several parties hereto who are land owners, appropriators of water, or who are receiving water for irrigation from the different incorporated companies or through the several canals owned by the parties hereto, have ever maintained their right to their several priorities as against the coöwners of land or co-users of water in their respective canals, but the individual land owners and appropriators of water that is furnished under the management of each of the several ditches or canals, herein referred to, have surrendered to their co-users in that canal their priority, and the water that is taken from the river for the use of the land under the several canals has been, by the consent of the different land owners under each canal, delivered to the different tracts of land in accordance with the extent of the interest in the ditch or canal of each land owner, regardless of the acreage cultivated by the said land owner, and regardless of the date when the said acreage was placed under cultivation."

Findings XI and XII are as follows:

"XI. On the 17th day of February, 1897, a decree was entered in this court in action No. 505 wherein the Montezuma Canal Company was plaintiff, the San Jose Irrigating Company, a corporation, Chiricahua Cattle Company, a corporation, Pedro Michelena and others were

defendants, wherein it was judged and decreed that the plaintiff had the right and was entitled to have flow into the Montezuma Canal continuously from the Gila River at all times during the dry season of the year when water is low and scarce in said river, 1,000 miner's inches of water, and was entitled to have flow from the said river into said canal 2,000 miner's inches of water at times of wet seasons of the year when water is high and plentiful therein, as against each and all of the defendants in said action, and in which it was ordered, adjudged and decreed that said defendants above named, and all persons claiming under them and each of them, be perpetually restrained and enjoined from diverting or taking water from the said river above the head of the plaintiff's said canal, or in any manner obstructing the flow of water in the said river, so as to prevent the said water from flowing in the bed of said river down the same, and therefrom into plaintiff's canal to the full extent of a thousand inches during each and every dry season of the year when water is low and scarce, and also from in any manner preventing the said 2,000 miner's inches of water from flowing down the channel or bed of said river, and from flowing therefrom into the plaintiff's said canal during the wet seasons of the year when water is plentiful in said river.

"XII. On the 18th day of September, 1900, a complaint was filed in the District Court of the Second Judicial District, in and for Graham County, Territory of Arizona, in action No. 797, in which the San Jose Irrigating Company was plaintiff and E. L. Tidwell *et al.* were defendants, and on March 31, 1901, a stipulation was filed in the said cause No. 797, by and between the San Jose Irrigating Company and its stockholders on the one hand and Frank Dysart, Pedro Michelena, and Frank McLean, using water on lands owned by them, through the Michelena Ditch, on the other hand, in which it was stipulated and agreed that the grantors and predecessors

in interest of both parties made their original appropriation of the water of the Gila River at the same date or time and that neither should, as against the other, claim or attempt to prove any prior or superior right to any of the water of the said Gila River by reason of having been prior in date or time of making the original appropriation of the water of the said Gila River; and on the 29th of June, 1901, a decree was entered in the said District Court in the said action No. 797, in which it was found and decreed by the court that the first right to diversion, use and enjoyment of the water in the Gila River, after the prior appropriation of 1,000 miner's inches theretofore decreed to the Montezuma Canal Company, was in the plaintiff, the San Jose Irrigating Company, its shareholders and stockholders, to the extent of a perpetual flow of 1,500 miner's inches, and in the defendants Frank Dysart, Alexander McLean, and Pedro Michelena, using water through the Michelena Ditch, to the extent of a perpetual flow of 500 miner's inches of water in the Gila River.

"That neither the plaintiff or defendants, users of water under the Michelena Ditch, have priority of right over the other to the use of the water of the said Gila River, but they shall have equal right thereto, and shall pro rate the flow of water in the Gila River in the above proportions in case of scarcity of water therein, or in case of a failure of a full flow of water in said river from any cause sufficient to supply each with the quantity herein decreed, to be the quantity to which each is entitled in point of time."

We excerpt in full in the margin [1] the decree which was

[1] Be it remembered, that on the 28th day of April, 1905, the same being a regular judicial day of the April term of the said District Court, this cause came on regularly for trial before the court without a jury, a jury having been expressly waived by the parties in open court. The parties appeared in person and by their respective attorneys, and

entered by the trial court, omitting the tabular statement as to the amounts of water to which the water-users under the several canals were entitled when the surface flow at the head of the irrigating system was 300, 400, 500,

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the court having heard the testimony of the witnesses and the arguments of counsel, and having examined the documentary evidence, the records and papers introduced by both parties, the evidence was closed and the cause was submitted to the court for consideration and decision, and after due deliberation thereon and examination of the briefs filed by the attorneys of the respective parties, the court delivered its findings and decision in writing (filed herein) and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged and decreed that the several parties to this suit are entitled to receive and are hereby authorized to divert and convey from the Gila River water sufficient, each for his or their lands, from time to time, in the amounts and in the order of priority as shown in the tabular statement hereto attached, and filed herewith, and marked "Tabular statement of amounts of water to which the water users under the several canals are entitled at different stages of water in the river, showing the accretions to the surface flow at the head of the irrigation system, and giving the approximate amounts thereof at the head of the different canals."

And the several parties hereto are each hereby forever enjoined from in any wise obstructing or interfering with the rights of any of the other parties to this suit and for the purpose of carrying into effect this decree Albert T. Colton is hereby appointed a commissioner of this court, to hold said office and exercise the powers and duties thereof, hereinafter prescribed, until a further order of this court.

The said commissioner shall have the power, at all time, when it shall be proper and necessary, in the discharge of his duties, to enter upon any and all of those certain canals and ditches known as the Brown, Sanchez, Mejia, Fourness, San Jose, Michelena, Montezuma, Union, Sunflower, Graham, Central, Oregon, Smithville, Bryce, Dodge, Nevada, Curtis, Kempton, Zeckendorf-Clavenger, Reid, Fort Thomas, Zeckendorf-Collins, Thompson, Military, Saline, and upon each and every part thereof, and upon all the dams, gates, flumes, and other structures and appliances, for the obstruction, diversion, or conveyance of water from said Gila River for the irrigation of lands under any or all of said canals, or ditches, and have supervision and direction of the placing of, changing, closing or opening, of the same for the

750, 1,000, 1,500, 2,000, 2,500, 3,000, 3,500, 4,000, 4,500, 5,000, 5,500, 6,000, 6,500, 7,000 and 7,500 inches respectively.

The question arises whether due effect was given to

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purpose of the discharge of his duties, and to direct the placing of proper gates, dams or other means for the control of the water of said river at the heads of the canals or other points on the banks of said canals as he may direct, at the expense of the parties hereto interested therein, and to make such rules and regulations as he may deem proper and expedient, to be observed by the parties hereto, for the distribution and use of said water.

And it is further ordered that said commissioner shall in person, with the assistance of such help as he may need, superintend and control the distribution and use of water by the parties hereto, and by the proper practice direct the diversion of such water from said river and its conveyance to the place of use by whatsoever means he may deem best to secure the greatest economy therein. In the service of said water he shall direct the distribution thereof in accordance with the rights of the parties as to the extent of land irrigated and order of priority of time of appropriation as in this decree established. In the distribution and use of such water the commissioner shall take as a basis of the supply necessary for the cultivation of said lands one-half of a miner's inch constant flow for each acre of land, or at that ratio, reckoning forty miner's inches as the equivalent to a flow of one cubic foot per second; provided, however, that no land shall be served with an amount of water in excess of that beneficially used thereon. In measuring the water so supplied the measure shall be taken for the water supplied to the several canals at the point of diversion from the river.

The commissioner shall report, from time to time, to the court as to his action in the premises, and shall, whenever he needs the same, apply to the court for further directions as to his powers and duties to make this decree effective.

Any of the parties to this suit may apply to this court for any proper modification of this order or in the supervision and direction of the commissioner.

The compensation of said commissioner shall be one hundred and fifty dollars and twenty cents ($150.20) per month, and shall be paid by the parties hereto in the proportion set out in the following table, to wit:

A table designating the amounts to be paid by the water users un-

the decree entered in the action No. 505 on February 17, 1897, in favor of the Montezuma Canal Company, referred to in finding No. XI; in other words, Is the decree as entered warranted by the facts as found?

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der the several canals and ditches, as their pro rata proportion of the salary of the commissioner, based upon the acreage irrigated under each canal:

Canal.	Acres.	Amount.
Brown	100	$ .65
Sanchez	400	2.55
Mejia	320	2.00
Fourness	260	1.65
San Jose	3000	19.00
Michelena	450	2.85
Montezuma	3750	23.75
Union	2900	18.35
Sunflower	400	2.55
Graham	962	6.10
Central	2675	16.95
Oregon	1100	6.95
Smithville	1760	11.15
Bryce	515	3.25
Dodge	450	2.85
Nevada	800	5.05
Curtis	800	5.05
Kempton	850	5.40
Reid	100	.65
Ft. Thomas	960	6.10
Thompson	240	1.50
Military	400	2.50
Saline	36	.20
Zeckendorf	500	3.15
Total acres	23,728	Total am't $150.20

And the said parties shall pay said proportionate sum into the office of the clerk of this court for the use of the said commissioner on the first day of each and every month.

And it is further ordered and decreed that the gates of the water users in arrears of payments to said commissioner in accordance with the foregoing provisions may be kept closed by said water commissioner until said arrears are paid and satisfied.

We premise that the Montezuma Canal Company and the defendant, individuals and canal companies in action No. 505, whether viewed as appropriators of water or as mere carriers for others, sufficiently represented the users of the waters of the respective canals to cause such water-users to be bound by the judgment. *Tenem Ditch Co.* v. *Thorpe*, 1 Washington, 566; *Arroyo Ditch & Water Co.* v. *Baldwin*, 155 California, 280; 100 Pac. Rep. 874.

The portions of the tabular statement annexed to the decree with which we are now concerned relate to the distribution of water adjudged as between the Montezuma Canal and the canals above the head of the Montezuma. Although, as against the appropriators of water served by the San Jose Canal and the Michelena Ditch the Montezuma Company by the terms of the decree in ac-

It is further ordered and decreed that in the case of each incorporated company, party hereto, that is operating a canal or ditch the pro rata portion of the said commissioner's compensation falling due from the acreage of the water users of such canal shall be a charge against the canal company and shall be paid by proper officer of such company to the clerk of this court on the first day of each month, for the account of said commissioner, and the said officer of the said canal company is hereby authorized to close the gates of water users, under the canal operated by said canal company, who may at any time be in arrears for more than sixty days in the payment of the pro rata share of said commissioner's compensation due from the acreage owned or controlled by said water users, and the said officer is hereby ordered and required to close the gates of the said canal at any time the said canal company may be in arrears of payment, for more than sixty days, to the clerk of this court of the pro rata part of the compensation due from the acreage irrigated under the said canal, and to keep such gate closed and the flow of water through said canal arrested until said arrearage is paid in full and the commissioner is hereby authorized to superintend such closing of the gate and arrest of flow and to see that the same is done in accordance with provisions of this decree. The parties herein each pay their own cost and the court cost common to all parties necessarily incurred herein is adjudged against all the parties hereto in the same proportion as the salary of the commissioner has been apportioned herein.

tion No. 505 "had the right and was entitled to have flow into the Montezuma Canal continuously from the Gila River at all times during the dry season of the year when water is low and scarce in said river, 1,000 miner's inches of water," these provisions were disregarded in the distribution of water ordered in this case. This plainly appears when it is considered that by the decree the following allowances were made to the San Jose and Michelena Canals, when, if the rights conferred upon the Montezuma Canal by the decree pleaded as *res judicata* had been respected, no allowances whatever at the stated stages of water could have been recognized as existing in the San Jose and Michelena Canals, viz., 120 inches when the surface flow at the head of the irrigation system is 400 inches, 320 inches when the surface flow is 750 inches, 480 inches when the surface flow is 1,000 inches, and 600 inches when the flow is 1,500 inches, with an allowance also to the Mejia Canal in the latter event of 30 inches.

While the findings do not establish the reasons which led to these allowances contrary to the decree which was pleaded as *res judicata*, there is room for conjecture that the deductions from the Montezuma and the allowances to the San Jose and Michelena Canals contrary to the decree were made for the following reasons: *a*, As it was found that in 1875 Ellsworth and others had appropriated water for the irrigation of three hundred acres of land, and were diverting the same through the San Jose Canal, and the date of this appropriation was prior to some of the appropriations served through the Montezuma Canal, it was considered that this priority should be regarded in the distribution, even if to do so would conflict with the prior judgment in favor of the Montezuma Canal; and *b*, Because the share which was given to the Michelena Canal out of the allowances made contrary to the prior judgment in favor of the Montezuma Canal was presum-

ably so given to the Michelena Canal, in order to comply with the terms of the judgment in action No. 797, referred to in Finding XII, which establish an equality of rights in the water between the San Jose and the Michelena Canals. But if this be the theory upon which the court considered it was justified in disregarding the prior judgment, its action was erroneous. This was so, because the rights of the appropriators to the water carried through the Montezuma Canal as against appropriators of water diverted by the San Jose Canal were adjudicated as late as 1897 by the decree which was pleaded as *res judicata*, and as no facts were stated by the court which served to take the appropriations of water made by Ellsworth and others in 1875 out of the operation of the judgment of 1897, we can perceive no reason why the fact that appropriations were made in 1875 by Ellsworth *et al.* justified a disregard of the rights which the judgment of 1897 established in favor of the Montezuma Canal.

The remaining contention urged is based upon the action of the trial court, affirmed by the Supreme Court of the Territory, in the appointment of a water commissioner to make distribution of the waters of the Gila River pursuant to the apportionment adjudicated by the decree, and imposing upon the Montezuma Company a liability to pay its *pro rata* share of the salary of the commissioner as fixed by the decree. The Supreme Court of the Territory was of the opinion "that it is essential that an officer of the court be continuously on the river to regulate the amount to be diverted under the decree by each canal, in accordance with the ever-varying volume of water in the river, according to the tabulated statement," that the appointment of the commissioner was a proper choice of a method to carry the decree into effect, and that the appointment was authorized as well by a section of the Revised Statutes of the Territory, providing that "the court shall cause its judgment and decree to be carried

into execution," as by the power which the court possessed by virtue of its "general jurisdiction to provide all necessary means to carry out its judgment and decree."

It would indeed seem that the decree was modeled upon legislative remedies provided for similar situations in other jurisdictions, as the decree and the remedies which it affords bear a peculiar resemblance to legislative provisions enacted in some of the States where irrigation is practiced, to control and regulate the use of water for irrigating purposes. See part IV, Wiel's Water Rights in the Western States, 2d edition, pp. 590 *et seq.* The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in *Farm Investment Company* v. *Carpenter*, 9 Wyoming, 110, "to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water."

But because it was within the legislative power to provide administrative machinery to supervise the common use of water in a flowing stream by those having a lawful right to appropriate the water of that stream for beneficial use, it does not result that the decree entered by the court below was in excess of its authority. On the contrary, in view of the absence of legislative action on the subject and of the necessity which manifestly existed for supervising the use of the stream by those having the right to take the water in accordance with the decree, which, undoubtedly to that extent, the court was authorized to render, we think the action taken by the court did not transcend the bounds of judicial authority, and therefore is not justly amenable to the attack made upon it. It follows from what we have said that error was committed by the court below in refusing to give due effect

to the judgment in action No. 505, which was pleaded as *res judicata* by the Montezuma Canal Company.

The judgment of the Supreme Court of the Territory of Arizona is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.